IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

THE CITY OF HUNTINGTON,	:	Civil Action
Plaintiff,	:	No. 3:17-cv-01362
v.	:	
AMERISOURCEBERGEN DRUG CORPORATION, et al.,	:	
Defendants.	:	
CABELL COUNTY COMMISSION,	:	Civil Action
Plaintiff,	:	No. 3:17-cv-01665
v.	:	
AMERISOURCEBERGEN DRUG CORPORATION, et al.,	:	
Defendants.	:	

BENCH TRIAL - VOLUME 39
BEFORE THE HONORABLE DAVID A. FABER, SENIOR STATUS JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

JULY 27, 2021

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PROCEEDINGS had before The Honorable David A. Faber, Senior Status Judge, United States District Court, Southern District of West Virginia, in Charleston, West Virginia, on July 27, 2021, at 9:00 a.m., as follows:

THE COURT: Good morning, everybody.

SIMULTANEOUS SPEAKERS: Good morning, Your Honor.

THE COURT: I want to go over the schedule here just to make sure that I understand it and we're all on the same page.

The plaintiffs will take four hours today and rather than break in the middle of their argument, we'll take a late lunch. And they're reserving two hours for rebuttal.

AmerisourceBergen will do a two-hour argument this afternoon. Tomorrow, we'll have Cardinal for two hours and McKesson for two hours in the morning, take another late lunch, and then come back for the plaintiffs' rebuttal. Is that -- is my understanding on that correct?

MS. MAINIGI: That's correct, Your Honor.

MR. NICHOLAS: Yes, Your Honor.

MR. HESTER: Yes, sir.

THE COURT: All right. Mr. Farrell, are you going to lead off here?

And I understand the mic is going to be down temporarily, so keep that in mind.

MR. FARRELL: Keep my voice up.

THE COURT: Right.

MR. FARRELL: Good morning, Judge.

THE COURT: Good morning, Mr. Farrell.

MR. FARRELL: I have the honor today to speak on behalf of Cabell County, West Virginia and, as you mentioned, I will reserve for tomorrow a few personal observations. Today is about business and tomorrow will be more personal.

So, I wanted to start off with where we began not only in the opening, but in the first witnesses at trial. And if you'll recall, we called Dr. David Courtright as a witness in this case. He was the second witness. And he was the author. And he wrote the books about the opioids and public policy. And he said something that I -- I think is poignant for all of us to remember because this is an historic case.

What he said was, is that a historian is a person who tries to tell a true story about the past based on primary and secondary sources with an emphasis on primary sources where they are available.

We endeavored throughout the last 38 days of trial, 40 live witnesses, 28 video witnesses, to present to you the facts for you to assemble into the true story of what happened in our community.

Distilling this down into some very basic fundamental principles, what we have is, we have a number of puzzle

pieces. Some people begin with a puzzle by taking and separating them into colors. Others break it out into themes. Sometimes, we build the frame first. But what I wanted to do was I wanted to get down to the very essence of what our case is about and I drew up a formula as simple as I could draw it up.

81 million pills distributed to a community of a hundred thousand people or less isn't a substantial factor in the opioid epidemic. It will cause an opioid epidemic.

I want to start with that premise. These three facts on either side of the equal sign are undisputed in this case. There is no one who will stand up and has testified in this court that the number 81 million is wrong.

The data that we entered, that we subpoenaed the federal government for, that we fought for for a year, that we processed, that we brought to you in painstaking detail, is undisputed.

You have also taken notice of the population of Huntington-Cabell County. That's undisputed. And I would venture to say on the right hand of the equation there's barely anyone that will dispute there is an opioid epidemic in Huntington-Cabell County, West Virginia. These are facts, Judge. Now, the link between the left side and the right side is where we spent most of the trial and most of the debate.

So, sometimes what lawyers like to do is they like to go through all of the evidence, witness, by witness, by witness, and almost like with a score card, as a baseball fan, go through each witness and say, well, this witness hit a single. And this witness, he hit a home run. And this witness struck out. And go -- if we were to do this for all the live witnesses and all the video depositions, I'd probably exhaust the entire amount of time that we have.

But instead, right up front, what I would like to do, with your permission, is to present to you video clips of two witnesses that were submitted for your review. And those two witnesses are Nathan Hartle and Tom Prevoznik. They're both very short clips and they go right to the heart of our causation case.

And so, for a little bit of background, Nathan Hartle was designated by McKesson as their 30(b)(6) designee. And he was the very first witness that was deposed in this case. The very first one.

On July 31st, 2018, I took his deposition in a 30(b)(6) capacity and my colleague, who was here, Mr. Troy Rafferty, took his deposition the following day, on August 1st, 2018, in his individual capacity in regulatory compliance for chain pharmacies.

MR. HESTER: Your Honor, I hate to object, but I do need to raise the point we have a motion pending as to

Nathan Hartle and to exclude his testimony from this trial and I just need to preserve the record, need to preserve that point.

THE COURT: All right. The record will show your objection. I'm going to allow him to do it, Mr. Hester, and --

MR. MAJESTRO: Your Honor --

THE COURT: Mr Majestro? I'm sorry.

MR. MAJESTRO: Could we all just agree that all of the objections that we've raised to evidence on both sides are preserved so we don't disrupt each other over the course of these closings?

THE COURT: Well, I think they are, Mr. Majestro.

MR. MAJESTRO: I do, too, Your Honor, and that's why I would just like to let Mr. Farrell be able to continue without any further interruptions.

THE COURT: Okay, Mr. Farrell. Go ahead.

MR. FARRELL: The second witness that we're going to show is Thomas Prevosnik and he is the Deputy Assistant Administrator of Diversion Control Division for the DEA. And he was designated as the 30(b)(6) designee by the DEA on a laundry list of specific topics by both the plaintiffs and the defendants and was deposed over three days. Three eight-hour days, we sat this nice gentleman in a chair and asked him questions. I have a short clip from him, as well,

where I asked him five questions, a syllogism, if you will, that takes us through the causal connections.

So, the first is Nate Hartle.

(Recording played in open court as follows)

If a wholesale distributor engages in unlawful conduct, should it be held accountable for the societal costs of prescription drug abuse?

I believe distributors have a responsibility in preventing diversion.

Well, back to McKesson Corporation, which is you sitting in the chair today. Knowing what you know as the 30(b)(6) representative, the corporate designee, knowing about your past conduct, knowing about the past interactions with the DEA, I'm going to ask you again: Does McKesson Corporation accept partial responsibility for the societal costs of prescription drug abuse in America?

Again, you know, I -- we're part of the closed system, so we're responsible for preventing diversion.

So the answer is?

Again, I think we're responsible for something. I don't know what -- how you define all societal costs and -- I still believe it depends on different circumstances.

Sir, we're not going to parse out percentages.

Yeah.

Let's just talk globally for McKesson Corporation. So

I don't want to put words in your mouth because it's got to come out of your mouth. So, the answer is yes or no?

I would say yes, partially.

(Recording concluded)

MR. FARRELL: The second video clip is from Thomas Prevosnick and I asked him five questions and he gives five answers.

(Recording played in open court as follows)

Does the DEA take the position that the purpose of the Controlled Substances Act and its federal regulations is to prevent diversion?

Yes.

Does the DEA agree that diversion is foreseeable if registrants fail to comply with federal law?

Correct.

And failure to comply enables more diversion. Does the DEA agree with that?

Yes.

Does the DEA believe that more diversion is detrimental to public health and safety?

Yes.

Does the DEA agree that the more pills which unlawfully enter the market results in more diversion?

Yes.

(Recording concluded)

MR. FARRELL: So, Judge, respectfully, what we've done in this case from July 31st of 2018 until you will see here in April of 2019, we slowly built a record and we bring this record to you and we believe that the record that we have established has sufficient facts for us to meet all of the elements of our case. These two witnesses are but a piece of the puzzle that we've put together.

So, in essence, where we're at in summation, Judge, is here. This is no different really than a jury trial, the difference being you are both the finder of fact, as well as making legal decisions.

Now, normally what would happen is that we would go back in chambers with a court reporter and we would argue for sometimes a day about the jury instructions. And then we would submit them and, in fact, in the old days, you would put down in the left-hand corner "accepted", "rejected", or "modified", or "withdrawn", and you'd have all of these checks on those boxes.

THE COURT: You did that in state court. I never let the lawyers do that. I had ways to cut that short.

(Laughter)

MR. FARRELL: So, what we've had here is we've had plenty of briefing, 12(b)(6), 56, 62(c). The law is the law and I'm not going to dwell on it. I'm not going to spend a lot of time. But I do want to point out a couple of key

components that summarize, from our perspective, the elements that we're going to use.

So, jury instruction number 1, let's start with this. And I think this addresses some of the questions that you raised earlier and, you know, it's one of the things we addressed when we first tried to understand public nuisance.

The term public nuisance is incapable of an exact and exhaustive definition which fits all cases, because the controlling facts are seldom alike, and each case stands on its own footing. That's 1960, *Harless v. Workman*.

I want to direct your attention to this last part. Each case stands on its own footing.

So, what's the footing that we stand on, right? What -- where is it -- where are we coming from when we decide that this is a public nuisance case?

And I'd like to make a reference to something that Judge Goodwin said back in 2017 that caught my attention. You're probably aware that your brethren has a few cases with plea agreements and he's made some -- some opinions that went all the way to the Fourth Circuit and this is what he says: There is a clear, present, and deadly heroin and opioid crisis in this community. West Virginia is ground zero.

So, from this standing, this is the footing upon which we're going to bring a public nuisance case. We have two

very good pieces of law for us to take a look at. The first is general in nature.

And you'll recall that Judge Chambers, your brother in Huntington, has *Sigman v. CSX*, a 2016 case, where he cites and acknowledges *Hart v. Mountain Fork Lumber Company* from 1945. And in this it's three sentences. It's probably the most cited reference in West Virginia law on public nuisance.

And, Judge, if I may step down?

THE COURT: Yes.

MR. FARRELL: And what I'd like to do, and I know I'm going to be off mic, but I'll try to raise my voice a little here.

THE COURT: I'm hearing you just fine so far, Mr. Farrell.

MR. FARRELL: 1, 2 and 3, three sentences, and I'd like just to draw your eyes and your attention to a couple of key things.

A public nuisance is an act or condition. So, we have alleged the condition in this case is the opioid epidemic and we've definitively defined it in the record as addiction, abuse, morbidity and mortality.

Number two, there's a distinction between public nuisance and private nuisance. We've briefed this. We've talked about it. But this is really my first chance to make

some commentary on it.

You see, the individuals in the community have standing to bring a cause of action on their own behalf on behalf of their own damages. The County Commission and the city government could bring a private cause of action for their own expenditures. That's not what we've done here.

Rather, what we've done is rather than bring cases on behalf of the standing of the individual, we've brought the case on behalf of the general public because, as number 3 says, it is the duty of the proper public official to vindicate those rights.

The next section is the Restatement of Tort (Second) and, as you'll recall, there's a whole string cite where federal and state courts have acknowledged that West Virginia precedent follows the Restatement (Second) of torts.

These are the elements that we tick off as we go down our list of evidence. This is the framework of the puzzle. This is the burden we have to carry.

And what it's my intention to do is, through a verdict form, walk you through each of those elements and show you in the record where we have established facts to support your findings. That's my intention for today.

So, there are eight questions that I think are pertinent. There may be more, right, but there are eight

that I think are a proper framework for us to address. And I could sit here for an entire day and go through all of the evidence.

Notably, you didn't make any findings of cumulative throughout the trial. That's with kudos to my colleagues on both sides. But there is voluminous evidence that you can draw on.

So, question number 1, is there presently an opioid epidemic in Huntington-Cabell County, West Virginia? Even if everybody believes this to be true, we still have the burden to come to you and prove it.

We could ask you to take judicial notice. We could file admissions. But, in essence, we have to create a record for you to check yes on this.

This is the evidence that we have put into the record that we believe is undisputed. It's a heavy weight of evidence.

Between 2015 and 2020, we presented the testimony of Connie Priddy and through three exhibits, two entered by the plaintiffs and one by the defendants, we've established 6,494 overdoses occurred in Huntington-Cabell County, West Virginia. That's a population of less than a hundred thousand people.

Through Dr. Smith, you'll recall Dr. Smith, Gordon Smith, who is the Australian epidemiologist who is now at

West Virginia University. He didn't extrapolate. He didn't study with numbers and take -- he went and studied himself the number of fatalities in Huntington-Cabell County, West Virginia. The gold standard.

I don't know of any other place in the country that has gone into that much detail to document the overdose fatalities in Huntington-Cabell County, West Virginia. 1,151 lost souls to the opioid epidemic.

We called Dr. Joe Werthammer. You will recall Dr. Werthammer was a neonatologist and he was the one that came in and talked about how they started with so many babies that they had to divide out their neonatal unit between a NICU and an NTU, a Neonatal Therapeutic Unit, Lily's Place, and he testified that he estimates that today, in Huntington-Cabell County, West Virginia, there are living 2,500 babies, young children born and diagnosed with Neonatal Abstinence Syndrome. This is the group of young children that we will be taking care of for the rest of their lives in this community.

And then the final piece is the Opioid Use Disorder. You heard from several different places, but as you recall, Dr. Katherine Keyes, she was the epidemiologist from Columbia, and she came in and she walked through the methodology of what she estimated to be the number of people that are currently suffering from Opioid Use Disorder in

Huntington-Cabell County, West Virginia.

Our population has dipped down since the 2010 census to somewhere around 90,000. So, that's 8,200. That's almost ten percent of the residents could be classified as suffering from Opioid Use Disorder.

But not only did we present those facts. We also asked the defendants themselves. We said, do you acknowledge there's an opioid epidemic?

You heard perhaps some of the lawyers throughout the case stand up and say nobody is disputing that there's a problem in Huntington, but the lawyers aren't evidence. The witnesses are.

We also brought in four different expert witnesses. And then, if you look here, starting at the bottom left, we presented evidence from a national perspective; the bottom right, from a state perspective; the top left, from a county perspective; and the top right from a city perspective.

And then we called witnesses, both in public health and in public safety, who each testified.

Now, I could do this for all eight of the questions. I'm only going to go into this much detail on the first one, but we have actually documented for you by transcript record and page the references to submit to the Court. For each of the experts the question was specifically asked of them, including the defendant's own expert.

We've submitted the documents. The first is the OIG Report, which you probably have 15 copies of by now because of the number of references to it.

This is the -- this is the historical overview.

You'll recall Dr. Gupta when he came into office. One of the things he did was to document what was actually happening in West Virginia.

The Resiliency Plan where the County and City and all the healthcare providers and community leaders got together. They have offered evidence that there's an opioid epidemic.

The City of Solutions with our mayor, who is here with us today, they've put into record that there is an opioid epidemic. So, we think definitively you can sit here and say check yes to number 1. We got number 1 down, a check mark yes.

I don't think there'll be much dispute, but when we go through the rest of the questions, you'll see they are of increasing importance. I staged them that way. And I'm going to just highlight for the Court where I'd like to draw your attention to make a definitive answer.

The second question, is the opioid epidemic a significant interference with public health and safety? Now, initially, we thought perhaps this was a legal question because the defendants filed a 12(b)(6) and there has been some argument, which was denied. This Court has said that

the -- that at least from a public health perspective it is a public right.

But even if we get over the legal obstacle, which we have, we nonetheless spent time in this courtroom establishing a factual record to support your finding. The first thing that you can reference is Congress itself, in 1970 -- as a side note, when I first began looking into this case, the first thing that I did was I went and looked at the U. S. Code. And in the very first provision, 801, it has a statement that I probably could not have written any better myself for this case.

The illegal distribution, among other things, of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

You can also go and look at the definition of "addict" in the U. S. Code. In 802(1), the very first definition in the Controlled Substances Act, it says that the addict means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare. In Huntington-Cabell County, West Virginia ten percent of our population is addicted.

We also put in testimony from Mr. Prevoznik from the DEA. He makes a comment that filling suspicious orders is a detriment to the public health and safety.

The testimony of Joe Rannazzisi, who came live to testify, and what he said, that the failure to maintain effective controls is an imminent threat to public safety.

We asked witnesses. You'll recall Chris Zimmerman, the Senior Vice President from AmerisourceBergen. I asked him specifically, do you acknowledge that the opioid epidemic has had a devastating impact on public health and public safety? He says yes.

Joe Werthammer, Dr. Gupta, and then even Dr. Gilligan from Harvard, Women's and Brigham Hospital. And I want to read to you the statement that I read to him because I think this answers question number 2 in the affirmative.

Question, the magnitude, severity and chronic nature of the opioid epidemic in the United States is of serious concern to clinicians, the government, the general public and others. Do you agree with that statement, sir? He said, yes, I do.

Two more documents. The only medical literature that's entered in the record at the defendants' request is from Dr. Compton, the National Institute of Health, the 2019 article, and he specifically references that the opioid epidemic is a crisis in terms of both mortality and morbidity and underscored the complexity of the public health, public safety, and clinical response.

And then, finally, you have the Harm Reduction Plan

that the State of West Virginia entered.

The heroin and opioid epidemic is one of the great public health problems of our time, period. That's a fact. And, of course, this Court, last year, referenced that our Former President of the United States has entered -- declared that the opioid crisis is a public health emergency. I don't think that there's any reasonable person that can say that number 2 is anything other than a yes. Number 2 is a yes definitively in this record. It should be undisputed.

Number 3, was diversion of prescription opioids a substantial factor giving rise to and fueling the opioid epidemic? What this is, is general causation, Judge. We had to identify for the record the concept that what was driving and fueling this opioid epidemic was the diversion of prescription opioids.

And, as Joe Rannazzisi testified, a breakdown of the closed system will cause diversion. Will cause diversion. And he said on Volume 21, Page 178, Lines 2 through 4, when prescription opioids are diverted, they're used illicitly. People become addicted, people overdose, and people die.

In Joe Rannazzisi's first Dear Registrant letters to the defendants, that's P-32 at Page 10, it says that the dangerous and potentially lethal consequences of such abuse, even just one distributor that uses its DEA registration to

facilitate diversion can cause enormous harm. I'm going to come back to that word facilitate eventually.

I'm not going to read each of the question, but this is a repeat. The five questions we asked the DEA, the five questions in the record, April 18th, 2019, Page 641 through 643. Diversion happens in America and when the volume goes up, the diversion goes up. And the more diversion there is, the more dangerous it is to public health and safety.

Now, Your Honor, you could also check yes to number 3 just by using common sense and basic logic. As Nate Hartle said in the very first deposition in the case, using common sense and basic logic, you can assume the more pills that are out there, the more potential for diversion there could be, right?

But you don't have to guess because you will recall Dr. David Courtright came in this courtroom and testified that the historical record contains evidence from primary sources that supply was a substantial factor giving rise to prior opioid epidemics in the United States.

You'll recall, Judge Faber, that there were no questions asked of Dr. Courtright. His testimony went in uninterrupted. Un-refuted. And what his testimony here says is that supply being a substantial factor is not just a theory. It's a historical fact. It makes it foreseeable.

You also have from Harvard Medical School Dr. Gilligan.

His testimony, Page -- Volume 34, which is Day 34. At Page 181, Lines 19 through 20, he testified, there is a significant amount of diversion and improper use of opioid analgesics.

Now, to get to one final point, and I'm not going to belabor this because it's technical, but it's important. And I put it up front to make sure that I had enough energy and focus to walk through this.

Dr. Gupta, when he was here as our Commissioner of Public Health, published a series of reports and I have put the P numbers that are all in evidence on this. These reports that he walked through for a day and a half definitively established what was happening with diversion in West Virginia.

And I want to talk about the social autopsy for a second. I feel as if this part of the testimony didn't come in as clean as -- as I was hoping. It's because it's a technical piece. He was being cross-examined on it. And so, it wasn't a format. So, the record is in. You can read this at P-44211. But I want to explain what he did.

Dr. Gupta wanted to figure out what was happening and why people were dying from opioid overdoses. And so, he went and identified every single overdose that happened in the State of West Virginia in the year 2016, all 830 of them.

And, in essence, what he did was contact tracing. He went backwards in time with the help of all of his colleagues to trace the history of each of those individuals. And what he was able to determine was that there was a significant percentage of those that died that had prescription opioids in their system with no prescription.

That is the seminal evidence, the first case in the country to do that. Not a subset. He wasn't extrapolating. He went and looked at every single overdose in West Virginia in 2016.

So, the question number 3, was diversion of prescription opioids a substantial factor? We have put on sufficient evidence for this Court to find that nobody can dispute that diversion is a substantial factor in the opioid epidemic in Huntington-Cabell County, in West Virginia, and in the United States.

Question number 4 is not typically a question that a jury would entertain. This is a legal question. Do the defendants owe a duty to maintain effective control?

I just want to make a couple of comments on this, on stuff that perhaps hasn't had the emphasis to draw your attention to at the end. Dr. Courtright testified, and it's un-refuted, that the Controlled Substances Act reformed drug policy in the United States creating one organic body of

law, which included a closed system to prevent diversion of prescription narcotics. This goes to foreseeability.

The reason and purpose of the Controlled Substances Act was to prevent diversion. And violation of the Controlled Substances Act leads to diversion, an un-refuted historical fact in the record.

This is -- this is another aspect that we've kind of bounced around. What level of conduct? What's the measuring stick for the conduct for the defendants?

Is it the Controlled Substances Act? Is it the CFR? Is it negligence? Is it -- what is -- how do we measure the conduct?

Well, I want to point out a couple of things because this kind of dovetails into the remoteness argument, as well. In 1983, *Robertson v. LeMaster*, my good friend, Bob Fitzsimmons, continues to remind me this is the most underused syllabus point in civil practice.

One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm.

So, in this context, Judge, the defendants, the distributors, engaged in affirmative conduct by distributing 81 million prescription opioids into a community of less than a hundred thousand people.

Now, just taking a step back, what do you think is going to happen anywhere in America if you dump 81 million pills of pharmaceutical grade heroin into a community of a hundred thousand? It's not conjecture. It's a fact.

They were under a duty to prevent the threatened harm of abuse, addiction, morbidity and mortality and they failed. Their argument is that the injury that we're alleging, the harm, the related harm of the opioid epidemic, is too remote for them to be responsible.

Again, from West Virginia law in 1988, *Sewell v. Gregory*, the test is -- the test is would the ordinary man in the defendants' position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Again, what is that they knew and, if they didn't know, should they have known was the nature of a general harm of dumping 81 million pills of prescription opioids into a community? How can anybody say that heroin is too remote of a consequence after dumping 81 million pills of the same molecule into a community?

The risk reasonably to be perceived defines the duty to be obeyed, *Mallet v. Pickens*, representing Justice Cardozo, that's *Palsgraf*. They would have you find that the related harms are remote from the distribution of 81 million pills. We would argue that they're direct and we'll get into that

more later.

Now, I'm going to fly through these because this is still under duty, but I do want to make reference, and this is for the Court, that in the DEA 30(b)(6) deposition the DEA was asked two things.

One, they were asked, do you agree with the plaintiffs' positions? And, two, do you agree with the defendants' positions?

But, more importantly, we framed the questions in terms of was this consistent with the advice that you were giving to the defendants?

The record is replete with repeated statements from the DEA and, Judge, I'm here to tell you that the positions taken by the DEA are consistent with *Masters Pharmaceutical*. Consistent with the MDL in Cleveland with Judge Polster. They're consistent with Judge Breyer in San Francisco. And they're consistent with every, every piece of legal ruling you've made in this case and that the defense positions that it has taken regarding the Controlled Substances Act in this deposition have been repudiated.

In fact, I want to walk through precisely where one of the conflicts is. You'll recall Chris Zimmerman. He is the Senior Vice President for AmerisourceBergen. He testified it's not our job to police the pharmacies. It's not our job.

He testified that the duty that they have is only imposed upon AmerisourceBergen while the pills are in their possession. Diversion, to him, means I didn't have any leakage from our warehouse.

He testified that they're responsible to make sure that transportation company gets the pills from the -- from their warehouse to the pharmacies.

And then, as you recall, I held up Joe Rannazzisi's letter number 1 from 2006 and I read to him the passage. I read to him the passage about due diligence to avoid suspicious orders and his answer in Volume 8, Page 218, Lines 19 through Page 219, Line 4, is that he doesn't agree with the DEA's position in Rannazzisi letter 1.

Nonetheless, we believe that Your Honor was correct and that the factual record supports your finding that the defendants do owe a duty.

So, the next question, number 5, and I guess this question we spent a lot of time on. Was the conduct by the defendants unreasonable?

So, as you'll recall in the standing order that you entered and in the briefing, there is a debate on what kind of conduct is actionable. This Court has written an order, and we agree, that the conduct that the defendants engaged in will be measured by reasonableness.

And so, with that, if you look at the undisputed record

in this case of the volume of pills sold by the defendants, it's -- it's more than 80 million pills.

Judge, I proffer for the Court and I say to you that on its face, selling 81 million pills to a town of less than a hundred thousand people, prescription opioids, is unreasonable per se. I don't know of anywhere else in the country that can show this tsunami of pills.

What I have also done with this is to support Question 5 with any permutation of any legal change. I have what we call in state court special interrogatories, but in the Federal Rules, they call them a special verdict. I came up with a special verdict for you, Judge, and it has six questions in it so that each of these six questions is supportive of finding the conduct was unreasonable.

Now, make it clear, we don't have to prove all six of these for you to find in our favor. You've just got to find one. One on any of these six questions, we believe is sufficient for you to find under public nuisance law of an unreasonable interference. And I'm going to walk through each of them.

Did the defendants unreasonably fail to maintain effective control to prevent diversion? Now, I think this answer we've established with the volume alone that the answer is yes. It has to be yes.

But to illustrate this, I was thinking about the

findings of fact because, as you know, we've had teams of lawyers on both sides working on these findings of facts and conclusions of law but, ultimately, you're going to have to write this order. And I think, I hope, I pray, that you believe we've presented overwhelming evidence for this statement to be true and you're going to have to fill in the blank.

And there's -- various courts have used various words and phrases, but you're going to have to come up with your own synonym. So, I've got a couple for you.

The massive volume of prescription opioids distributed by the defendants demonstrates failure to maintain effective control. You could call it sheer volume, colossal volume, mountainous volume for West Virginia mountains, staggering, astronomical, obscene.

But here's the point, Judge. There's only one word you have to use to make this finding and that's unreasonable. We think you check yes to 5-a under any of these adjectives on volume alone.

Now, 5-b, did the defendants fail to design and operate an effective Suspicious Order Monitoring System? This is, as some of my colleagues say, is when we got into the weeds, went down a rabbit hole. But I want to spend a few minutes talking about, just in general, a couple of things.

Judge, when you look at any one of the matrixes, it's a

series of transactions. The defendants have an obligation under law to look at these series of transactions and identify orders of unusual size, frequency or deviation from a normal pattern.

What we've done in discovery is we've attempted to apply their own rules. That's C -- that's D, E and F. We've attempted to apply the rules that come from the *Masters Pharmaceutical* case. That's A and B. And we attempted to apply the rule that our expert witness, Jim Rafalski, used in the *Mallinckrodt* case.

What we're suggesting to you, Judge, is it doesn't matter which of these you use. And what's interesting is that the defendants didn't rebut this by showing up and applying their own matrix.

In fact, when they called their witnesses, their algorithm experts, we asked them, did you apply the methodology, the algorithm of the company that hired you to come here today? And they said no.

They would poke holes in everybody else's algorithms, but as I'm going to demonstrate, no matter which of these algorithms we used, the patterns of the volume in this case, the alarm bells should have been going off and, if the alarm was not going off, then there's a design defect in their program to begin with.

So, here's how we start it, and this is a point that we

probably tested your patience with, but it was necessary for a very important reason. The systems the defendants were using were nationwide and systemic. What that means is, is that there was a corporate headquarter policy. There was a single system and it applied to every distribution center in America.

We put the volume, the page, and the line numbers because we think this is an important fact that is undisputed in the record.

When you look at the testimony of Joe Rannazzisi, he -- we've cited in the record each of the three companies' testimony that documents that the administrative actions that were taken were taken for systemic failures.

And then, finally, we showed that the defendants were warned by the DEA. That's the black flags. And that each defendant was sanctioned by the DEA. And we put the P numbers in, which are the exhibits for you to look at directly.

Another point for you to consider on their designs. Each defendant, at some point in time, used a three-times multiplier to flag suspicious orders. So, as you recall, one of the things that I try to do is to use analogy and experience to try to understand new concepts.

And this is the new analogy I have for you -- a hot water tank. What -- what do you think your hot water tank

is set at in your basement? 110 maybe, right? There is some level of hot water that is acceptable.

If you set your hot water tank's safety valve, then it doesn't trigger unless it gets up to 330 degrees. You're missing an entire range of some dangerously hot water.

That's what a three-times multiplier is. Their alarm bells were set for a hot water tank to give people notice if the water got higher than three times 110. And, as we'll show you, the water got up to five times, six times, seven times, eight times in the record. And if the alarm went off, then somebody re-set it and shipped again the next month.

This is another point that I think is a problem for the defendants. It's undisputed in the record. Once the system was flagged, they were under an obligation to freeze the account.

And, Judge, I even pulled -- if you'll recall, Steve Mays from AmerisourceBergen, he testified with this document. This was the policy at AmerisourceBergen from '07 to 2014. And you'll recall we walked through the sequence, the flow of events.

And once an order is flagged by the system, it is -- the system is designed to hold current and all future orders from customers of like items. Once the fire alarm goes off and the system is triggered, all further shipments are

supposed to be locked out until somebody comes in and does due diligence and hits the re-set button.

This is why, when you look at some of the data that we've put in, we can't find a whole lot of due diligence. So, this is why, when you look at this compilation slide of two different things, this is 44765 on the threshold, and this is one of Craig McCann's charts.

This is SafeScript Pharmacy. Here's the date range. Here's the volume by month. So, when you look at this, the national average is somewhere around 5,000. If you take three times 5,000, the line should be somewhere around here. AmerisourceBergen shipped more than that to this pharmacy repeatedly and there is no due diligence sufficient to come in and say it was justified.

Some of these defendants used thresholds. This is the threshold for SafeScript in the record. As of July of '07, their threshold was 10,000 pills. What that means is the algorithm should have shut down any pills above 10,000 in a month and, as you can see, every month is in excess of 10,000 without any justification in the due diligence.

Furthermore, when you go down and look at the threshold changes, somebody internally was raising the alarm level all the way up to 45,000 pills a month before it gets triggered. Perhaps they got tired of the fire alarm being tripped repeatedly, and so they raised the threshold, but we don't

know because there's no due diligence.

The defendants are going to argue, oh, but there was due diligence. We just didn't keep the records long enough. We weren't required to keep the records long enough.

And as the DEA testified under 30(b)(6), that is an argument they've heard before. And in the *Masters Pharmaceutical* case, on Page 218, the DC Circuit Court not only rejected that as an affirmative defense, they used it as evidence that no such transaction occurred.

5-c and 5-d, I could spend all day on our matrices. Right? These are the three matrices. But what I've done instead is this.

I've made for Your Honor copies of my big board and what I'm asking you to do is to take these back into chambers, true and accurate blowups of the paper, stick it on your big oak desk, and then look through it yourself.

Column 1 is the national average. Column 2 is the state average. Column 3 is the county average. We then put month, by month, by month, the transactions with pharmacies in Huntington-Cabell County, West Virginia.

And then, just to show this wasn't an anomaly, but that it was a systemic failure, we put all of the others over here from around the region. And the defendants, what the defendants' argument in this is, is not that any of these numbers -- I want to get this right.

Their argument is not that these numbers are incorrect. Their argument is, is that you shouldn't be allowed to see outside of Cabell County. Let me say that again.

I'm not being pejorative about it. They're good lawyers. I respect every one of them. It's the same defense I would make.

They're not arguing that this volume is wrong. What they're arguing is you should only look at this part. I submit to you, sir, that if you look at just this part, you can reach every conclusion supporting our case. And, when you look at the rest, there's no doubt that this system, if it was designed to trigger, then they were not operating it as such.

So, I have P numbers. On one side is the hydrocodone. On the other is oxycodone and with your permission --

Now, 5-e, the defendants argued that it has to be reckless conduct, that they can't be held liable in public nuisance unless their conduct is reckless. I guess they're immune unless the conduct rises to the level of reckless.

Well, I've got three pieces of evidence, and I'm not going to belabor the point, but this is probably the one that I think jumps out at me immediately and that's because it comes from AmerisourceBergen. And you'll notice it's the Columbus division, Lockbourne.

This is the fellow in charge of regulatory compliance

for Huntington-Cabell County, West Virginia. That's his job. And what he's talking about in 2012 is when SafeScript got shut down by the DEA and he said, hey, you might want to look at this.

But that's not why I bring your attention to it. I bring your attention to it because of his signature block. My signature block says, "Facts are stubborn things" from John Adams. His signature block is from Pope John XXIII and says, "See everything, overlook a great deal, correct a little." If that's not the perfect argument for me to make in closing of what happened here, the defendants saw everything. They overlooked a great deal. And they corrected very little.

Number 2, and this is a little more callous, but I put it in here simply because this goes to heroin and related harms. The defendants knew it. The lawyers make great lawyer arguments. The defendants know heroin is a related foreseeable harm from prescription opioids. And the reason they know it is that, in this article, in this e-mail string, P-16690, when you read it yourself, the article says that prescription drug sales are plummeting and that heroin deaths are rising.

That's what this e-mail string is doing. It's forwarding that newsletter and this fellow says, good. Let them move to heroin and meth. We don't have to monitor

that. Now, this goes to the people at the top of the chain, including Michael Oriente, who took the stand.

And then, finally, for Cardinal Health, they identified back in 2012, in P-2803(8), a particular pharmacy in Huntington, West Virginia, The Medicine Shoppe, and in this e-mail the Cardinal Health person said that there was a black hole. And then I want to read into the record what this says.

"This pharmacy has experienced significant growth from the stimulant drug families and new pain clinic business. QRA vetted the new pediatrician prescribing stimulants and nothing significant appeared from a DEA license search."

And this is the next sentence. "A competitor in town was raided by the DEA, which resulted in the arrest of a non-pharmacist owner. The Medicine Shoppe has seen a significant growth in both areas and, to my knowledge, a site visit has not been conducted after submitting six requests to validate growth and the information being provided to corporate."

What they're talking about here is the SafeScript getting shut down and the -- the people that were going to the SafeScript are now going to the Medicine Shoppe. And when you go and look at Cardinal Health's matrix and you look at the volume here, you'll see that the people on the ground were asking corporate to look into it and they sold

more pills.

This is like playing Whack A Mole for the DEA and Cardinal Health knew it. They were sending requests for somebody to validate this growth of this black hole and nothing happened.

5-f, this is -- this is going to be my -- my favorite portion of today's closing. Did the defendants intentionally disregard the health and safety of the general public in Huntington and Cabell County?

The defendants say that they have to have conduct that's reckless or intentional. We say it's unreasonable. I say you have ample evidence to answer this case in the affirmative and you need to look no further than *Direct Sales v. United States*. *Direct Sales v. United States*, this is the case that was given to the defendants in 2005 during the distributor initiative.

Sometimes my colleagues make fun of me for talking about this old case so often. I'm going to talk about it again. And I'm going to try to do my best, Judge, to get your attention to read this case. And so, I've done a couple of things to do that.

The first thing I've done is this. I have on loan --

THE COURT: What makes you think I haven't already read it, Mr. Farrell?

(Laughter)

MR. FARRELL: See? That's good feedback.

I have here in my hand the original United States Supreme Court Reports, Volume 319, and I put a tab in here for *Direct Sales*. I'm hoping you'll read it from the original book. This is a 1943 book.

Now, I'll leave it with your clerk, but I have to tell you, we borrowed it from the WVU College of Law library. And so, you'll have to return it eventually.

Can I approach?

THE COURT: Okay.

MR. FARRELL: Now, the second way I'm going to try to get your attention is this. Do you see where I highlighted who wrote the opinion, Wiley Rutledge? I don't remember Wiley Rutledge. He didn't write too many opinions, but he is notable because he's had two famous law clerks. One of them is Jean Paul Stevens and the other is a fellow named Dean Louis Pollak. He was the Dean of Yale while you were there.

THE COURT: I picked him up in the rain and gave him a ride home one night.

(Laughter)

MR. FARRELL: The other thing I wanted to point out is, I wanted to point out from the *Direct Sales* case, it's on appeal from South Carolina. It's on appeal from the Fourth Circuit. And one of the three judges on the panel

from the Fourth Circuit was a man by the name of Judge Elliott Northcott. Do you recall that name?

THE COURT: Yes.

MR. FARRELL: He was the West Virginia sitting assignment and, as a matter of fact, he was the former city attorney for the City of Huntington.

So, the quote that I put out here that you'll read in the context is that it seems too clear for argument that Dr. Tate, who was both the physician and the dispenser in this case, could not have possibly used anything like the quantity of morphine shipped by the wholesaler in his legitimate practice as a doctor in a small town.

The Fourth Circuit used a word, another adjective, that I think is more apt for us to insert into our colloquy here. The volume, the Fourth Circuit said, was inconceivable.

So, getting back to up on appeal in the high court, I pulled out three points. And the reason why I pulled these three points out is because I think that not only does it provide the framework for what happened, but it gives you causation, as well as related harms.

The first quote, narcotic drugs have an inherent capacity for harm and from the very fact they are restricted, which makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully.

In this case, it was a criminal conviction for conspiracy based on the volume of pills sold by the wholesaler to the dispenser. The United States Supreme Court said that the knowledge -- it makes a difference because this is the very nature of the -- of the narcotic.

Do you see the very first part? Inherent capacity for harm, from the very fact that they are restricted. Provides a basis that they have knowledge that that volume of pills, the buyer would utilize unlawfully.

The second portion, and as you read this case, what you will find is that some of the defenses raised here in this courtroom were raised in *Direct Sales*. In fact, the wholesaler in that case said all we have to do is make sure that the guy we drop it off for has his Harrison stamp, his Harrison narcotic stamp, and then we're done, just like the defendants in this case have said all we have to do is make sure the pharmacy has a DEA registration.

What the United States Supreme Court found was there is no legal obstacle to finding the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible.

And in what perhaps is the best statement on causation I can think of, the primary effect of this volume of pills in this case by the United States Supreme Court, the primary effect of the conduct is to create black markets for dope

and increase illegal demand and consumption.

We think you can answer all six questions in the affirmative. It takes us to 6.

Now, this is a specific causation. What this is, is some dispute of whether an oversupply by the defendants had related harms. That's a technical defense that they've raised and they're not arguing in the opposite. They haven't put any proof it's not true. They're just saying that we can't prove it.

Well, we wrote a question and we asked our expert from Columbia. We put into the record, do you have an opinion whether the volume sold by these three companies would be a substantial factor giving rise to and fueling the opioid epidemic and its related harms? And she said, yes. My opinion is that it's a substantial contributing factor.

We also asked the same question of Dr. Gilligan. So, you have Harvard and you have Columbia. And Dr. Gilligan frankly testified consistently with Dr. -- with Columbia, with Dr. Keyes. And what he said is that I think if there are a large number of medications prescribed in any area, there will be some of them that will be diverted, misused, abused.

And so, that there would be some incidence then where that diversion, leading to misuse, abuse, there would be some instances where that would lead someone to initiate

heroin.

And this is the -- this is the part that grabbed my attention. I think that would be statistically likely in any area with a large number of opioid pain medications that were prescribed. There is no other place in America that has more prescriptions per capita than in Huntington-Cabell County, West Virginia and, if there is, then we rank up near the top.

Dr. Gupta said the same thing. You'll recall he used the flooding analogy. He said that this area was flooding and that we were doing all that we could, but we were drowning. And he made a poignant remark at the end. We were drowning and we didn't open the floodgates, which is a theme I will return to tomorrow.

And then, in the last question of the last witness that I asked a question of, Dr. Colston, I asked Ms. Colston, my understanding is that you take the position that an oversupply of prescription opioids is not the causal factor of the opioid epidemic, but is only a causal factor? And she said that's correct.

And under Professor Cady's tort exam, it reminds me that all we have to prove is that it is a causal factor and not the causal factor. So, we think the record undeniably establishes number 6 in the affirmative.

Now, this is question number 7, is the opioid epidemic

abatable? And this is where perhaps I'm hoping to engage you because what we are trying to establish is that this epidemic is abatable. Judge, we can make a difference.

Dr. Alexander testified this is not a moonshot. We put on evidence and you heard from the people in our community, boots on the ground that are dealing with this every single day, and what they're doing to try to piece together grants and funding and what works for them.

We've also overlaid on top of that from the leading expert in the country, from Johns Hopkins Bloomberg School of Public Health a plan. And he says we can do it if we provide treatment programs.

The expert from Harvard agreed. The expert from Harvard testified on Day 34, Page 179, Lines 28 and -- through Page 180, Line 4. Dr. Gilligan agrees with the statement that closing the path to Opioid Use Disorder will require addressing overprescription of legal opioids, reducing the availability of illicit opioids, and getting patients with Opiate Use Disorder into treatment.

This is important, Judge, because based upon the social autopsy, what Dr. Gupta found is that 81 percent of the people that died from a drug overdose of opioids in 2016 had interacted with our healthcare system.

The point we're trying to make here, Judge, is we can reach them. We've designed an evidence-based treatment

program that can make a difference. We have the infrastructure and the people in our community are willing to do the work, which leads us to number 8, our abatement plan.

As you'll recall, the abatement plan has four aspects to it. We have an economist come in and put a number on each of the categories. You'll recall that the largest section of it is Section 2-b., 1.7 billion for treating the Opioid Use Disorder. And you'll recall that the only real debate with this is the number because Dr. Rufus, from the defendants' own expert, he said that we don't need that much. We only need 644 -- 644-million worth, not the 1.7 billion.

And as you'll recall, Mr. Majestro asked him, so you're saying that the appropriate number is somewhere between 644 and 1.7 billion? Now, I have a personal opinion on where you should land between the two but, ultimately, what we're trying to do is we're trying to create treatment programs that we can make a difference and save lives and we can be a shining example in our community and the nation on how to get out of this problem.

Category 3 is public safety. We've put in on what we need to keep our community safe.

Category 4 is the supporting special individuals.

So now, my dismount, as I tell people, before we take

our break.

The defendants are going to make summation arguments and talk about the standard of care. They're going to talk about statutes.

Well, let me back up because, see, Dr. Courtright testified on the second day of trial about the historical life cycle of the opioid epidemic and I'd like to come back and re-visit it because what this is, is the foreseeable outline of what the defendants are arguing.

This is what Dr. Courtright said. Well, it starts off with an increase in incidence, large number of new cases, and it continues to grow. And then, there's a public reaction to that. There's concern. There's newspaper stories like Eric Eyre's Pulitzer Prize winning story.

There are angry speeches in Congress like when the CEOs testified in Congress. There are papers that are given at professional meetings by physicians exploring the increase in something like morphine addiction.

And there's a reaction. And the reaction leads to reform, both within the medical profession and, also, often statutes to deal with the problem.

Judge, this is not new. The defense is foreseeable. This is the foreseeable life cycle when you open Pandora's Box and you let out the opium. It has consequences. It's toppled governments.

81 million pills into the community and this is what happened. It got people's attention. It got Congress. It got newspapers. It got reform. A change in the standard of care.

What we're suggesting, Judge, is the un-refuted testimony is that everything they've said is completely predictable and it's why the Controlled Substances Act was written the way it was.

The second thing the distributors are going to do is they're going to try to -- they're going to say, Judge, we're just one aspect of the whole opioid epidemic. I've made a black hole of puzzle pieces to try to demonstrate an image for the opioid epidemic and what the distributors initially do is they try to sever their connection to the opioid epidemic. That's the first defense that they've done.

They've asked you to throw the case out for intervening and superseding cause. We don't believe -- and they have the burden to show that. And we don't believe that they've established their burden of proof for either of them. What their arguments are, are remoteness, that it's not foreseeable that dumping 81 million pills into a community of less than a hundred thousand is going to have adverse consequences. We don't believe that this is credible.

The second thing that they do is they're going to say,

okay, if we are responsible for the entire opioid epidemic, so are a bunch of other people. And they blame the manufacturers, and bad doctors, and good doctors, and pharmacies, and the State of West Virginia, or the Board of Pharmacy, the Board of Medicine, PEIA, the FDA for approving the daggone stuff and the DEA.

But, Judge, two comments on this. Number one, the distributors are the only ones in this case and they didn't file cross-claims against any of them. And the law, as it stands, if you follow Judge Moats at the MLP and you accept on the face value the rejection of the writ of prohibition, it doesn't matter if there's anybody else with substantial fault because it's joint and several liability and they should know it.

So, if that is the case, there is a contingency plan. The contingency plan for the defendants is to try to sever the indivisible harm.

THE COURT: Judge Copenhaver didn't buy that last argument you made in his City of Charleston case. How is that different from your situation here?

MR. FARRELL: Let's back up. He didn't buy that they were --

THE COURT: That -- that the other actors in the picture -- well, if I understood his opinion correctly, he held that the fact that there were other causes and other

actors preempted the liability or made -- did away with the liability of one of the actors; is that right? Did I read the case correctly?

MR. FARRELL: So, I will have to come back and piece it together. What we are talking about are the remand cases from the State of West Virginia back to Boone?

THE COURT: Talking about the opinion he wrote. And I had it in my hand awhile ago and I didn't bring it in here.

MR. FARRELL: So, Mr. Majestro is my legal expert. Are you talking about the remand where the doctors were severed?

MR. MAJESTRO: Talking about the City of Charleston.

MR. FARRELL: I'm going to defer to Mr. Majestro.

MR. MAJESTRO: Your Honor, I think I can answer the question. A very quick answer to that.

Yes, Judge Copenhaver did that. With respect to the claims against the particular defendants in that case, the Joint Commission, he specifically noted in that case, this case is not like the cases that the counties brought in 51 and specifically distinguished the Cuyahoga County and Summit County case, which is identical and on four -- all fours of this case.

THE COURT: Okay.

MR. FARRELL: Yes. He said that it is too remote for the JCHO. We think that, nonetheless, if you want to put JCHO into this bucket, there has to be the same analysis done for each of these defendants and that's the burden of the defendants in this case, not us.

So, if they want to allocate fault, they have to do two things. One is, they have to show it's divisible. And then they have to meet their burden of proof on cross-claims and they haven't.

So, as a result, if as a contingency they are on the hook, if you do find liability and you do address the opioid epidemic as an indivisible harm, then their backup plan is to try to sever out of it a particular piece of pie and that is why they've stuck so hard onto the gateway theory.

They're trying to exclude from the opioid epidemic that they're responsible for all things heroin and fentanyl-related. They're trying to separate that. That's their main goal.

So, that's why, Judge, the first witness we called in this case was Corey Waller. That's the first time he had ever testified. He's the only expert you qualified in this case on neuroscience.

And he testified about the structure, function and outcome of the morphine molecule. You will recall his tag lines. A molecule is identical. The brain doesn't know the

difference between hydrocodone, oxycodone and heroin. And the outcomes are the same, addiction, overdose and death.

And this is followed up by Dr. Kerri Keyes. You'll recall Dr. Keyes put on the entire record in the affirmative as to what the gateway effect and how it's established in known epidemiology.

And then you will recall Dr. Gilligan. And I don't want to belabor the point, but I went through Dr. Gilligan, his testimony, and I grabbed out a couple of quotes. And I've got them here and I can read them all into the record.

He says on Page 152, "Although the vast majority of prescription opioid exposure does not lead to heroin use, heroin incidence and prevalence rates were significantly greater among those who reported non-medical prescription opioid misuse", end quote.

You asked a question at some point in time about whether or not this is going to apply to people that started on heroin without ever seeing prescription opioids. We asked Dr. Gilligan that question and what he said was only one percent of the population abusing non-medical prescription opioids started with heroin. He said people who used heroin prior to non-medical use prescription opioids was one percent. That was Page 153.

Page 154, four out of five heroin users began with abusing prescription opioids.

On 178, again, remember, we had that thing with the kilograms versus deaths. He said 80 percent of the people talking heroin started with prescription opioids.

On Page 171, he said for every death, you could expect ten treatment admissions, 32 emergency department visits, 130 people who abuse or are dependent, and 825 non-medical users.

On page 178, he said those suffering from OUD shift to heroin because it is more accessible and less expensive.

Judge, what I'm proposing to you is this. The defendants would have you either find them too remote in their conduct to be responsible, or have them share responsibility, or have you carve out some small sliver that they're responsible for.

And what I'm here to say, Judge, is that we have established a record. We have done what we promised we would do 38 trial days ago. And there is one opioid epidemic and what we're asking for is your help. We have the workers. We need the funding.

So, with that, Judge, I conclude my comments today on behalf of Cabell County. That's the work we put in. And, tomorrow, I'll have a few personal comments I've held back.

So, after this break, my colleague, Ms. Anne Kearse, is going to step up and she has the voice of the City of Huntington and those that live in it. Thank you for your

time.

THE COURT: All right. This is a good place to take a ten-minute break.

(Recess taken)

(Proceedings resumed at 10:45 a.m. as follows:)

MS. MAINIGI: Your Honor, if I may just be heard before Ms. Kearse begins.

Your Honor, we have heard Mr. Farrell mention several times in his closing that he intends to save part of his argument, part of his statements, including his personal statements, for tomorrow. And we think that is absolutely improper.

Mr. Farrell's rebuttal needs to be limited, and I think this is well established, limited to rebutting whatever the defendants' arguments happen to be today and tomorrow. He can't save an entire part of his closing statement for later in the day tomorrow because, among many other reasons, we obviously would not have an opportunity to then respond at that point.

So we object to that. He's obviously noted it. We obviously are fine if he wants to add to his closing statements either now or after Ms. Kearse. But we certainly would be objecting to him raising tomorrow that which he could have raised today.

THE COURT: Well, is this going to be rebuttal

tomorrow or what do you anticipate they're going to say? And he says "yes."

MR. FARRELL: Yes, Judge. I'm aware of the Rules of Civil Procedure.

THE COURT: All right. Well, he's on notice now, Ms. Mainigi.

MS. MAINIGI: Thank you, Your Honor.

THE COURT: All right, Ms. Kearse.

MS. KEARSE: Good morning, Your Honor.

THE COURT: Good morning.

MS. KEARSE: I understand the mics are still not lapel so --

THE COURT: Well, so far I'm hearing you adequately.

MS. KEARSE: Okay, great.

Your Honor, on behalf of the City of Huntington and -- I want to take this time today, in addition to Mr. Farrell, to talk about the -- to drill down more on the community harms with that.

But the City of Huntington and Cabell County together have brought before Your Honor a single cause of action, and that's the public nuisance, against these three companies here today with one remedy of abatement of the public nuisance.

Your Honor has heard, as Mr. Farrell showed you

earlier, from a number of witnesses that includes the community. They include members of the City of Huntington. They include members of Cabell County. They include institutions of WVU and Marshall and various law enforcement, public health officials, and people on the ground who actually witnessed first-hand the opioid crisis in Cabell County and City of Huntington, and also have studied the opioid crisis in City of Huntington.

Your Honor, in addition to the witnesses, the documents have appeared from your bench there. But you have a mountain of, of exhibits that I imagine the law clerks are having fun with as well.

But in those documents, you know, today I hope to shed light on a couple of those documents. But they're so, so numerous, as Mr. Farrell indicated, that I think our findings of fact that will follow these arguments will be very, very detailed as well into what are in those documents, but I'd like to highlight a few of those today.

Your Honor, you've heard the evidence and we submit to Your Honor that we have demonstrated the City of Huntington and Cabell County are still in the midst of an opioid epidemic.

They've been harmed by defendants' failures to maintain effective controls to prevent the diversion of prescription pills into their communities, and the public health and

safety of the community has been significantly interfered with the rise of this public nuisance.

And the City of Huntington and Cabell County are well positioned to implement an opioid abatement plan and a response to the public nuisance, address the crisis in the community.

Your Honor, today, as an advocate but also a voice in the community, I want to go through some of the testimony today because it's important for Cabell County and City of Huntington that their testimony was heard in this courtroom and the record is made for your Court's consideration.

Simply put, we believe the evidence presented demonstrates that the fact that the health, safety, and the welfare of these communities are at stake, but we believe there's a pathway to recovery.

Mr. Farrell went over some of the expert testimony there, but I want to start with the exposure of prescription opioids as the driving force of the public nuisance. The accessibility and over-supply that is in the record of prescription pills have ravaged this community and it's undisputed that the more pills that are out there, the more potential there is for diversion.

Mr. Farrell played clips today for Your Honor so they -- the first one and the third one were actually played for you by video deposition and the designations that you'll

have before you. And also you've heard from Dr. Keyes.

But I want to take it a step further now from the, from the DEA and from the experts there and talk about our community and what they were seeing and the extent of the diversion on there.

You'll remember the first -- one of the first weeks we called Dr. Gupta. And Mr. Farrell referred to Dr. Gupta again today. And I asked Dr. Gupta about the, the public health and, and the exposure to prescription opioids in the community with that.

Dr. Gupta was very clear. Opioid addiction is a matter of public health. Through this trial, witnesses have focused on the public health and public safety of a community based on public nuisance to show the interference that the opioid crisis has had on their community.

The plaintiffs called Dr. Gupta. And I asked Dr. Gupta to educate the Court a little bit about public health since this is going to be well-founded in public health principles and, and safety.

Public health is fundamentally the art and science of designing strategies, actions, aspects that help lead to the prevention of disease, promotion of health, as well as those strategies ultimately that would provide high quality both prevention, surveillance, and treatment in terms of addressing long-term public health problems, as well as the

most pressing contemporary public health problems in a broad definition.

And I think this is important, Your Honor, as we carry through with, with the, the evidence that's before you and as we move towards our proposed abatement plan.

But I asked -- I also asked him, "Can addiction be a public health matter?"

"Addiction is a public health matter."

"How is addiction a public health matter specifically to opioids?"

"Whenever any condition is causing West Virginians to die every year by double percentage increase, that issue becomes a public health matter, period. The reason that people were using drugs and dying of overdose is because of the addiction."

Your Honor, opioid addiction has been a driving force to the opioid crisis in Cabell and Huntington.

In addition to Dr. Gupta, every local witness that came before Your Honor explained that the opioid epidemic and the addiction was widespread throughout Cabell and Huntington. And I'd like to take a little bit of time and just refresh Your Honor with some of the witnesses. Some of them were in the first week.

You'll remember Jan Rader, 27 years on the City of Huntington. She brought her medic bag with you [sic] and

showed you about the Narcan on that. And Jan Rader is not with us today. She's at the International Firefighters Convention actually.

THE COURT: She told me firemen still rescue kittens from trees.

MS. KEARSE: On a good day, they get to do that, yes, Your Honor.

And Chief Rader oversees six stations, 88 firefighters. And, and she told you -- we'll go through some of the testimony about that. But one of the things as, as to the widespread community harms I wanted to focus on on that, "Chief Rader, when you and your firefighters and other first responders are going out on overdoses, is it throughout the community?"

"It's everywhere."

She's been to restaurants where working -- workers, clientele, doctors' offices, dentists' offices, been to the park. She and her 88 firefighters who carry naloxone on their cars and the police with naloxone have been everywhere within the community overdoses. Nobody is immune from it. She's seen overdoses from as young as 12 and as old as 78. There's no boundaries.

Again, sometimes you look over and there's a four- or five-year-old watching to revive their patient (verbatim). She told you about going to overdoses of the classmates and

her friends, pervasive in the community.

She also testified, Your Honor, on that Friday about how her -- she and her men and other community members would be comforting families of overdose victims and testified about the ripple effect.

And the ripple effect is important as we talk about the community health and the community fact that addiction is a public health matter, as Dr. Gupta testified on that. She testified it's widespread and a lot of carnage.

You remember Connie Priddy who testified the day before Jan Rader. And she talked a lot about the QRT. But both she and Chief Rader talked about the number of overdoses they were going on.

Connie Priddy testified that 95 percent of the overdoses that she goes on are opioid-related. And Ms. Priddy testified that there's no typical overdose person. Really, it cuts across every socioeconomic line.

Our team will tell you that they have sat in an apartment with a dirt floor, a mattress, and they sit in million-dollar homes. It cuts across gender. It cuts across race. It cuts across every socioeconomic line. There is no typical person of the overdoses.

You heard on another Friday from Chief Holbrook. Chief Holbrook was a life-long resident of, of Huntington until he went down to Columbia, South Carolina, where he is now.

But the opioid epidemic went from one end of the city to the other. It really affected people from all walks of life. It didn't matter where you were, who you knew, where you lived, what color your skin was, or how much money you made. People were focused on fueling their addiction.

Again, Chief Holbrook testified, "What I saw during my time as a Police Chief was something that really has affected me profoundly. There was not one person through some connection, there was no degree of separation by the time I left Huntington that a friend, family, neighbor had not been touched by this problem, had not lost a loved one, had not reached financial ruin because of their efforts to address an addiction problem with a loved one."

Plaintiffs called Scott Lemley. This is similar to Chief Rader. You heard throughout the testimony in a small-knit community of Huntington and Cabell County you couldn't get away from going places and actually seeing your friends, seeing your classmates, and seeing your family.

Scott Lemley, who was a crime analyst who does all the data gathering for the City of Huntington and the Mayor's Office of Drug Control Policy, also was asked about the geographical nature and the widespread community harms that opioid addiction had.

Again, it was persuasive throughout the entire city. It varied, very young, very old. From a race standpoint, it

generally followed the demographics. But it went from teenagers to 70-year-olds and made it difficult to address and went through the entire community.

And Dr. Yingling, Associate Professor at Marshall University and Chairman of the Board of the Cabell/Huntington Health Department, testified the related harms of addiction have cut at every core of the fabric of our community. They have jeopardized many in our community.

This should not be in dispute, Your Honor. There's been widespread harm throughout the community, throughout all socioeconomic, throughout race within the City of Huntington and Cabell County.

Mr. Farrell actually showed you this one earlier. This is Chief -- this is Mayor Williams's forward within the City of Solutions that we'll talk more about that you've seen throughout the trial, again reiterating the fact that every community is being harmed and, more importantly, that the families, neighborhoods, and epidemic is a non-discriminating disease.

Presence of pills. Diverted prescription opioids infiltrated the City of Huntington and Cabell County. And the diversion of opioids into the illegal markets create a massive demand. The enormous quantity of pills shipped helped show that diversion was occurring.

There was abundant evidence, Your Honor, throughout the

trial that as the pills came in and pills were seen by the community, there also began to be an intertwining of heroin abuse, a reasonably foreseeable event to the defendants as a matter of law, history, science, and basic common sense.

As the breaches of diversion were occurring in the closed system, impact was bubbling on the surface of these communities.

The first responders were seeing a change. We talked about Chief Rader, a Fire Chief -- a firefighter since 1994. She saw an occasional overdose, occasional death. Most of the time she testified it was the alcohol [sic] that someone would know on the corner, the alcoholic.

Sheriff Zerkle talked about in the early days as a police officer, they didn't see deaths. They didn't see bodies. They didn't see what subsequent years and resent years have seen.

Again, Chief Holbrook testified they were also seeing an incredible volume of finding people in possession of prescription pills.

Jan Rader testified, "We started seeing overdoses. And at these scenes, we would see pill bottles, oxycodone, hydrocodone typically."

Sheriff Zerkle testified, "Huntington was flooded with pills. We had an overwhelming amount of prescription opioids being dispensed in our county."

And Mayor Williams testified, "It became apparent to me the heavy abundance of opioid pills being distributed within the community had heroin -- and heroin."

Scott Lemley testified as well to the fact that when they were doing their work and gathering information on drug seizures that he did for the HPD, he would see Oxycontin, Opana, Roxy 30 as examples in the seizures that the HPD were getting of diverted drugs, prescription pills, opioids, and more prescription pills.

This is boots on the ground and there's ample evidence that we'll provide of additional documents and testimony supporting the eyewitness testimony in addition to what the experts concluded in epidemiological studies of City of Huntington and Cabell County.

We also had reports from the -- you'll remember, Your Honor, I did show some of these in, in opening. But we actually went through these with the witnesses, particularly Skip Holbrook and Scott Lemley, with what the HPD and the reports were putting out into the community.

2011 the HPD, Huntington Police Department, annual report, emerging threats. Currently the most prevalent emerging threat to our community is the illegal diversion of powerful pain medications such as oxycodone and oxymorphone.

In 2012, currently there are two emerging threats; first, illegal diversion of powerful pain medications such

as oxycodone and oxymorphone, and the second was the growing use of heroin which has contributed to a significant rise in overdose deaths.

At that time, West Virginia was second in the nation for prescription overdose deaths.

The threat assessments also, in addition to the HPD reports, also talk about the diversion and abuse of prescription drugs in our region as an epidemic and the tragic cost to our communities. It's a community issue overburdening law enforcement, adding to prison population, overwhelming treatment facilities, and undermining the employability of work force and, most important, devastating families. Again, a public health crisis in Cabell County and City of Huntington.

In 2012 oxycodone seizures alone increased by 1,773 percent from 2010 totals.

Many people who have developed opioid addictions due to abuse of prescription medication turn to heroin. This is from the folks on the ground seeing this. It's not expert testimony, but what they're seeing in their community.

Many people who have developed opioid addictions due to abuse of prescription medication turn to heroin due to the lower price, 30 to 80 dollars for a prescription pill compared to 20 to 25 for a dosage unit of heroin. Boots on the ground.

What it did to the public health and public safety of our community is clear through these reports. The vast majority of property crime offenses investigated by the HPD are directly related to the drug trade.

Most theft is perpetuated by individuals addicted to drugs and in need of a means to support their habit. Therefore, any successes we experience in drug enforcement and treatment initiatives will positively affect property crime trends.

And we'll go -- there's more of these too but, again, all of our drug reduction efforts must include collaboration with other law enforcement agencies, as well as those agencies focused on addiction, treatment, and education, a core part of our case, a core part of our abatement plan, Your Honor.

2014 you'll remember Chief Holbrook testifying about his letter to the Mayor with that. But two years later they're still seeing a growing number -- growing use of heroin as the number one threat now in the City of Huntington.

The influx of heroin into the area over the past few years has contributed to a significant rise in overdose cases.

You'll remember Chief Holbrook testifying that this report was the most important document he wrote to the

Mayor. It outlined in detail the greatest threat to ever face our community, a pervasive drug culture and associated crime. Exhibit 41527 will be in detail with Your Honor with that.

But Chief Holbrook testified I saw -- he saw his town being decimated by the addiction. He saw the addiction explode. He saw the seizures explode. And the pill seizures were going up and the overdoses were going up. We were also seeing property crime go up.

The diversion and abuse of controlled pharmaceutical drugs, particularly opioid-based pain relievers, will continue to be the most serious threat to Huntington, 2014.

Although there's been an emergence of cheaper alternatives such as heroin, diversion of abuse of prescription drugs continues to pose a threat to our city. The most commonly diverted pharmaceuticals in our area continues to be narcotic analgesics such as oxycodone, hydrocodone, and methadone.

Again, the cost associated with the supply and demand for prescription opioids was occurring. And the opportunity for cheaper alternatives was being made as a heroin significant threat. The lower cost of heroin compared to the price of pharmaceutical drugs has created a significant problem for drug enforcement.

Chief Holbrook actually specifically talked to

diversion and what he was seeing within the City of Huntington and Cabell County. Oftentimes, especially with diversion, an investigation would start with a call on a tip line, a pharmacy calling, a traffic stop, and finding prescription pills in somebody's possession that they had not seen -- or not have a legitimate prescription, or one would have multiple pharmacies or doctors that they had been to.

You'd see evidence of what they looked like, maybe a pharmacist or a doctor again, distributing prescription drugs and opioids irresponsibly.

And the threats go on, Your Honor, about the direct results of the prominent prescription drug trend in Appalachia. The abuse and the availability of heroin will continue because of the high levels of prescription drug abuse. The availability preference and demands for prescription drugs, primarily opioids, has laid the foundation for the heroin market; again, Chief Holbrook, boots on the ground.

The heroin distribution and abuse in Huntington grew significantly in 2013. And, again, this is a direct result of the predominant prescription drug threat in Huntington.

Your Honor heard from the Mayor. You heard from Chief Rader. You heard from Scott Lemley and others in the community about the rising levels of overdoses and addiction

and what was next.

Chief -- Mayor Williams testified if you name the problem, you own it. He felt like he had to do something aggressive. Serious level of addiction in our community and we need the people to join together.

Your Honor has heard about the various reports. And these -- I would put these as some of the milestones within the community to come together as starting in 2015, 2014, and then into the other things with the Mayor's Office of Drug Control Policy.

I show these to you, Your Honor -- we'll go through some of these things here because this was a community responding to the crisis. This was a community looking at the crisis not only from a law enforcement, but also from a medical area of addiction with that. And we'll go through some of the things.

But these programs are also -- we went over in detail with you to show you that not only has the city and county come together, but they are familiar with the issues. They have an infrastructure in place and a partnership in place that many community members talked about with that.

The strategic plan. You heard from, from Chief Rader who talked about one of their missions was to deal with the addiction issues.

Scott Lemley, "We had to look at the data." They

looked at the data. They gathered the data. They had to work with the data to see what is really percolating here and how we're going to respond to it.

The strategic plan encompassed hundreds of meetings and over thousands of hours. They went out into the community and talked to law enforcement. They talked to medical communities. They talked to numerous people in the community in order to put a plan together on behalf of the community and with the community's help with that on there. They spent hours of time speaking and people hearing about opioid addiction and the consequences of such.

You saw two strategic plans. And the purpose in the 2017 was -- the purpose of this report is to provide a new two-year strategic plan outlining the Mayor's Office of Drug Control Policy key efforts in suggesting its continued commitment to the opioid crisis.

Three areas of focus: Prevention, treatment, and recovery and law enforcement.

Mr. Farrell mentioned that in the portion of the data gathered that they had in 2017 they reported that they were -- 10 percent of their population were addicted to opioids. Huntington and Cabell and Wayne counties was facing an epidemic.

Again, the Mayor's Office of Drug Control Policy aimed to improve its efforts in three key areas of prevention,

treatment, and recovery and law enforcement.

Areas that the community came together to work on was to divert people with drug addiction into treatment and to help them re-enter society once in recovery; reduce the incidence of Neonatal Abstinence Syndrome; prevent the spread of blood-borne pathogens; expand programs for outpatient treatment; develop treatment and recovery programs for women and children; streamline the stakeholders' efforts and data; and reduce drug trafficking.

This is a city and county, Your Honor, that came together and put out strategic plans to identify what issues that they had and try to deal with them the best they could. They gathered data to show the influx of opioid addiction and the impact on crime.

Mayor Williams testified that the mission is not accomplished. Their strategic plans laid the foundation and the framework for the community to be able to come together. And what came out of these plans was really a community coming together.

Jan Rader talked about the fact that when they went out there to see who was where and who was doing what and bring the partnerships together, this laid the foundation for the City of Solutions. It laid the foundation for the community to work together. It laid the foundation for the programs that we talked about to deal with the opioid epidemic at

that time.

Again, Your Honor, these, these two documents -- you heard testimony from Lyn O'Connell about the resiliency plan. You saw various drafts of the resiliency plan, of Cabell County coming together on a forward-looking, what are we going to do today and tomorrow, and the City of Solutions.

What have we done? What did we learn as we came through the Mayor's Office of Drug Control Policy? What did we learn from the community on there about opioid addiction and drug addiction and the solutions on there?

These are cornerstones to our infrastructure of being able to carry out future plans.

We asked Lyn O'Connell -- you remember Lyn. I think she was on the stand for three days, Lyn at Marshall University who at the addiction services has worked very closely with the City of Huntington and Cabell County and a very pillar of the community.

"Does the community have the foundation and the infrastructure to do what it needs to do?"

"The groundwork is there. We're standing on solid foundation right now. We have the community partners. We're uniquely situated because as a community, we chose not to bury our heads in the sand and acknowledge our problems. But, rather, we're living in an epidemic."

Mayor Williams also testified about the partnerships and the coming together. And as he testified, there's a formula that works in his mind and is very simple. It's that collaboration leads to partnerships. You collaborate, you start to create partnerships. Then you establish a level of trust. The outcome, not the tactic, the outcome ends up being hope. Again, this is coming together from the opioid epidemic they're still dealing with today.

Some of the experts that Mr. Farrell -- I want to touch on a couple of things of, of how we get here. We just talked about the boots on the ground as they were seeing the percolation of the pills there.

We brought Dr. Smith. If you remember, Dr. Smith was from New Zealand, a WVU epidemiologist. Dr. Smith spent time as he went through files to look at data. And you remember he had two different types of data that he was reviewing. He had CDC data, and then he had to go through data that was before 2000 to see the trends of overdoses of addiction.

And you'll recall his testimony that it was almost stunning to him that before 19 -- 1999, I think he used that year or 2000, he did not see any overdoses. He saw some, but there was very, very limited on that.

To me, the most important thing on the slide -- I'm going to show -- this is a demo slide. The heroin was not

much of a problem. And as you can see, the red line of the prescription opioids, that's all you saw was the dramatic rise in prescription opioids over the same period of time.

And during this period of time, there was very little heroin certainly being found in people who were dying. And it's important as we see the transition as we heard from the witnesses, as we heard from the experts, the drug in force to the opioid epidemic was prescription pills.

Dr. Smith testified about his data. Before 2000, only 76 drug cases per year in West Virginia from 1979 to 1999.

2001 to 2016, drug poisoning deaths in Cabell County alone 14 of 16 were opioid-related.

From 2001 to 2016, 1,002 opioid-related deaths in Cabell County representing 90 percent of all the related deaths in the county.

And 2001 to 2018, the rate of opioid-related poisoning deaths in Cabell County soared from 16.6 to 213.9 percent, one thousand -- one hundred thousand between 2001 and 2017.

Dr. Smith also talked about a medical article that we showed Your Honor that he had brought in his expert investigation. 2008 JAMA was an article that actually looked at a study that looked at 2006 deaths in West Virginia.

So we went to the social autopsy that we heard Dr. Gupta talk about in 2006 where they went through all the

death certificates.

In 2008 there was a study, the Hall study that did a similar thing, looked at the 2006 overdose deaths.

And the studies showed that 295 overdose deaths, 186, 63 percent, were associated with pharmaceutical diversion. And another 63, 21 percent, showed evidence of doctor-shopping. 275 to 295, 93 percent, showed opioid analgesics taken, but fewer than half had been prescribed. Again, prescription opioids causing harm to the communities.

2008 Social Autopsy, and then we had the 2016 Social Autopsy.

Dr. Smith testified about his various data search and his conclusion. And I believe Your Honor even asked him a question about this, about present day, what he sees with prescription opioids.

My conclusion from reading the literature, looking at my own reports, and what I found was that there is very, very conclusive evidence that prescription opioids in particular play -- continue to play a very important role in the drug overdose deaths in West Virginia.

As you'll recall, Your Honor, he looked through statewide and he focused on Cabell County.

And, likewise, he's not the only expert who has found that there was historically not much illicit opioid trade. As you'll recall, Mr. Farrell referenced a Compton article

that was used in the cross-examination of Dr. Waller.

Appalachia historically did not have much illicit opioid trade, but became some of the epicenters of the prescription opioid crisis. These new population of persons with addiction to prescription type opioids were primed for even greater dependence and crisis from the coming influx of heroin and illicit fentanyl in subsequent years, their document used on our expert.

You've heard the testimony of Dr. Keyes who came and also from her epidemiological studies and research concluded that the increased prescription opioid supply and exposure caused the increased mortality in Cabell and Huntington.

She took what our citizens saw and did the study and came to the same conclusion. Opioid over-supply is a substantial factor in overdose deaths in Cabell and Huntington.

Again, Dr. Gupta in talking about his 2001 and 2015 report, the number one cause of drug overdose deaths was associated with opiates, making West Virginia number one in the nation.

THE COURT: Ms. Kearse, in your view, did the over-supply actually create a demand for the illegal pills or did it just satisfy the demand that was already there? I don't think any of your witnesses addressed that.

MS. KEARSE: Specifically, I think, Your Honor --

I think part of our -- the over-supply of the pills that were presented into the community created an addiction to the prescription pills.

And Mr. Majestro will tell me if I get anything legalese on that one. But, but from the evidence, that's what we have seen just from the, from the experts, but also from testimony from, from our witnesses and clients who have testified before Your Honor.

Dr. Rahul Gupta -- Mr. Farrell touched on some of these. I'm going to touch on one report. We've talked about the 2001 and 2015 a bit. And just to remind Your Honor, we went through this report, and this was a time when Dr. Gupta became the public commissioner of the State of West Virginia.

And the first thing he did was go back and say, "What has been going on?" And actually commissioned a study, a very important study. He wanted to understand better from the dead so they could help with the living.

He testified extensively on this, this chart and his findings on that both in Cabell County specifically throughout and, again, the driving force of opioid addiction within the city and county of Cabell County. Over 6,000 drug overdose deaths in West Virginia from 2015 were opioid-related.

And you'll see, Your Honor, there's other drugs and

other things within these reports there, but the over-arching driving force of all of these studies and the results coming from those are the opioids detected in the drug overdose deaths. And I'm not going to go into much detail with that.

But I wanted to highlight one other report that we didn't spend a lot of time on. It was a long couple days with Dr. Gupta. But he did testify about the 2016 outbreak in the City of Huntington and Cabell County.

On August -- in August, 2016, within five hours there were 28 overdoses, one death, and there may have been two subsequent to that. On this day, the, the City of Huntington and Cabell County contacted the county health department who then contacted Dr. Gupta and asked, "We need to do something. What is going on?"

Dr. Gupta did the same thing as he did in the social autopsy in 2016, and did a study just specific for Cabell County on that day of what happened with 28 overdoses with that.

And with that, what he found was three areas that needed to be focused on. But, again, at least with this time, he actually had living people because they didn't all die. They could actually go through the records and interview and talk to people of what they did, not all 28, but a number of them.

And what he found was that one of the things that they recommended, in addition to gathering data, was the continuum of care was missing when you have someone who overdosed. How do we get out of a cycle of overdose? How do we deal with addiction?

And one of the things he actually testified to -- and I'll read this to Your Honor for the record. Again, another study to find out what can we do to -- for the future.

"And did you follow up --"

Question: "And did you follow up on these interventions with various community folks with Cabell and Huntington?"

"Yes."

"So we began to think, okay, how do we work with those recommendations moving forward? So one of the things we created at the point was called a QRT."

Your Honor heard a lot of testimony about the Quick Response Teams. Quick Response Teams became necessary as some of the cornerstones of what the community needs and other communities in regard to overdoses on that.

"QRTs are generally a team of first responders, a social worker, and someone from the Health Department. So if someone is in the hospital, comes in, and is discharged, within 24 to 72 hours a QRT will go back to the point and ask them, 'Hey, what are all these things we can help you

with? Can we offer you treatment? Can we offer you naloxone? Can we offer you any other assistance?' The idea here was to prevent these people from dying and overdosing and offering them a non-judgment way of treatment."

The three recommendations that came out were basically surveillance, the healthcare system response, and community response, again moving the opioid epidemic into the need for the surveillance to understand the data, for the healthcare response to ensure that there's a continuum of care that someone in the throes of addiction can get the treatment.

It specifically talks about the medically assisted therapy treatment that we've talked about in our abatement plan and others have testified through trial and a community response.

Opioid use disorder. Mr. Farrell touched about this. I'll go quickly through this. But Dr. Keyes talked about that. And I'll just, I'll just remind the Court of one of the consensus statements there; that opioid use disorder is caused by repeated exposures to opioids.

It seems obvious that you can't have opioid use disorder without the exposure to opioids. But Dr. Keyes took great length and time of going through her analysis to confirm that through epidemiology, that that is what she has seen in Cabell County and City of Huntington.

And the tremendous expansion, the supply of powerful,

high-potency, as well as long-acting prescription opioids led to scaled increases in prescription opioid dependence. That should be undisputed in this trial.

I'll talk a little bit about some of the related harms quickly so that we can just go over some of the evidence that we had. But then you'll remember I showed this, this earlier about the fabric of the community.

But Dr. Yingling laid out a number of the related harms of addiction, as did a number of other experts that I'll highlight with that. And we kind of drilled down by different subject matter so we could provide Your Honor additional testimony from experts on different things.

But the related harms of the addiction of opioids in a community has been the infections of hepatitis B and C; the pregnant mothers and their offsprings affected by addiction; the overflow of the patients in the emergency rooms; the hospitalization of patients; long-term care for those suffering from addiction; and the support systems and strain on Cabell County, City of Huntington; the loss of life, obviously, and the sadness if a loved one dies; the economic outcome of loss of life and displaced families; neglected children placed in foster care.

We took what Dr. Yingling talked about as a fact witness and what he's observed as a lifelong resident of City of Huntington and Cabell County and took these -- asked

the experts for them to look at their things too.

You'll remember Dr. Feinberg. Dr. Feinberg is a infectious disease specialist at WVU. And Dr. Feinberg came in to talk about specifically what she had seen in southern West Virginia and specifically what she has witnessed in Cabell County and what she has studied and published on regarding infectious disease and harms.

And sometimes these are subject matters that aren't easy to talk about with that. And sometimes it's hard to even imagine if you haven't been with someone in the throes of addiction of how we've gotten to injected use of drugs and how we get to then the, the harms of infectious diseases.

But she testified about the people who inject drugs. Every time you inject, there's a 1 in 160 chance of acquiring HIV. She talked about the new cases that were coming to Cabell County. In 2019, 90 percent were among people who inject drugs, opioid-related drugs.

And West Virginia has consistently been the top two or three states for hepatitis C infections, while Cabell County has been higher still.

She talked about the various hepatitis B, endocarditis. And Dr. Feinberg testified there's no question in her mind, in her professional opinion that the public health crisis of blood-borne disease and opioid use in Cabell County are

related.

You heard from Dr. Young. Dr. Young came in and talked about the children of family harms and the opioid epidemic increased child welfare with 80 percent related to substance abuse and the overwhelming number which involve opioids.

She talked about the opioid epidemic increasing the percentage of children and the harms to the children with that, as Your Honor will recall.

She testified about the pregnant women in Cabell County being admitted for treatment with OUD for prescription opioids, all ways of interventions that need to be implemented in order to work with the opioid addicted population that the city and county are facing today.

Again, Dr. Keyes and Dr. Alexander both looking from expert epidemiological studies. Dr. Keyes: Increased exposure to the supply of prescription opioids in a community has a positive causal association with child health harms, including Neonatal -- NAS which Your Honor heard about from Dr. Werthammer and others.

Dr. Alexander who we'll talk about more with the abatement plan: The opioid epidemic has created a need to disrupt the cycle, the intergenerational cycle of addiction. This gets passed down not invariably but not uncommonly from a grandparent to a parent to a child and so on.

I believe all of our witnesses that came before Your

Honor from the community talked about these various issues that then were studied by the experts.

I'll touch on this and Mr. Farrell touched on this too, but this will be in the record, Your Honor, and we'll have cites for you. But when we talk about the transition to heroin and the intertwining of the prescription pills and use of heroin, in addition to Dr. Waller's testimony about the molecular structure, Dr. Keyes testified about the volume of prescription pills increasing to heroin.

Dr. Gupta testified that we are consistently gathering data that was showing the use of prescriptions. And because the supply had reduced, they had transitioned to seek drugs predominantly.

You heard from Doctor -- from Skip Holbrook that I showed you earlier. I believe Mr. Farrell showed you both Dr. Waller and Dr. Gilligan's testimony on this.

The record is replete with Dr. Keyes, Dr. Gupta -- I won't go into every one of them. But Dr. Keyes remembered 80 percent of people who have used heroin started with prescription opioids first.

Dr. Gupta talked about the clear pathway from prescription drugs to fentanyl as a fact witness.

Again, Dr. Waller talked about the brain and the clear connection between prescription opioid abuse and heroin abuse.

Dr. McGuire -- you haven't heard much about him today. Dr. McGuire also in his studies and research of the harms associated with Cabell County as he put a dollar sign just to demonstrate for Your Honor the harm that opioids has, has put on the county and city, the high potential for abuse which can lead users to substitute more lethal opioids without accepted medical uses such as heroin or fentanyl.

Dr. Alexander we touched about and, again, Dr. Gilligan and Dr. Murphy. I don't know if we mentioned Dr. Murphy yet, defendants' health economist expert, also testified if you focus on abuse of prescription opioids and abuse of heroin, they're probably closer to substitutes like Coke or Pepsi.

Mr. Farrell touched on the abatement plan. I'm just going to touch on a couple things with this. And -- but, Your Honor, what we presented to you was well documented within the medical literature best practices of bringing together what is needed for the community.

Dr. Alexander specializes as an epidemiologist and works in the abatement. Each one of these have been actually utilized within the community, not all of them, some of them. And we went through that in the, the testimony and we'll have more in the findings of fact.

Sustainability is an issue. Whether there is capacity is an issue, and also just ensuring that we have the ability

for the funding to put these together.

There was some reference to the one epidemic and, and do you treat a prescription epidemic or a heroin epidemic any differently. It's one epidemic and that's why we've seen throughout this trial, throughout the witnesses there the intertwining of the two of opioids on that too.

But each have testified, again Dr. Keyes and Dr. Alexander and Chief Holbrook, that the epidemic is an opioid epidemic, not one particular type of opioid or another. It's an opioid epidemic. It's had a direct result and a predominant prescription drug threat in Appalachia.

Again, Dr. Alexander testified prescription opioids and heroin and fentanyl are two sides of the same coin.

I think it's important for our, our abatement plan that we're asking Your Honor the funding for it to demonstrate that there's still an on-going crisis. And the witnesses both that Mr. Farrell mentioned and that came into this courtroom and as documented in the documents, it's not going away tomorrow. It's going to take some time and we're still in it. It's a generational problem, so we will be dealing with it for quite some time.

Mayor Williams testified, "We fight it every day."

Dr. Alexander testified about the multi-faceted plan and treatment of opioid addiction is an important part of it. Mr. Farrell touched about this as well. And we've seen

it through just the, the experts in the case that if you're going to deal with the opioid addiction, you're going to have to deal with the, the treatment and the other areas of abatement that we're asking for on that.

You'll recall Dr. Waller, first witness, and he was actually asked about MAT. He actually has testified before U.S. Congress on MAT and has actually written the, the diagnostic book on medically assisted treatment.

He had a long conversation about it. But he also brought it back to the fact that the MAT is a -- evidence is so strong. It's been greater than half a century. Hundreds of thousands of publications have backed it up.

And it is a treatment for a community. It's a treatment for individuals. It's a treatment that ensures that the social networks and stabilize the communities.

We thought that was important to remind Your Honor that, that early testimony in the first day as we get to the last day that we're asking for an abatement plan on that too.

But, again, Dr. Alexander testified about the reviewing materials he's reviewed and speaking from the individuals, there's still an existential threat to the county and city and we need to scale up our programs. We need new programs and we need the funding to support it.

The cost of doing nothing is nothing. If we don't

address it, we just get into more enormous social and psychological and economic cost of inaction.

You heard, Your Honor -- just to, to remind you about some of the sustainability. We had witnesses on the stand who talked about the various grants they get. And, and I think every one of our local witnesses talked about the, the time that they take in getting grants to actually work through a lot of these programs with that. Most everything is written out as grant money. If you knew -- it is reliable funding that we need. Sustainability is what it's looking for. We can't do it all as piecemeal. The experts agreed grant money is not guaranteed. Funding is unstable.

Mr. Farrell went over the abatement cost plan on that too. All necessary elements of the plan that Dr. Alexander went through, his working with the community and working on his -- looking at what are the best practices and what are the known practices to alleviate an opioid crisis such as in Huntington and Cabell County.

I think it's important that we get this program -- as Jan Rader testified, addiction and substance use disorder is something that people live through, live throughout their lives. We've taken the plan out to 15 years to accompany that. It's not an overnight thing that we can work through. We need to take the time and it takes the funding to get to that plan.

We saw it during the pandemic. You heard from various experts of the rising number of overdoses that happened and the fragility of addiction. And part of that is the ability to have treatment available, have the resources available, have the tools available for people who are addicted.

I showed this in, in opening, Your Honor, and I think it's, it's a good way to, to wrap up my comments in addition to what Mr. Farrell covered is that the addiction in Cabell County and City of Huntington has been a community-wide health problem.

Addiction of opioids and the other harms associated with that has spread out the ripple effect in the community.

And I think it's important with this and we've talked about -- Dr. Gilligan actually was presented with the fact that for every one overdose, for every one death, there are 10 treatments of admissions for abuse. This is from the CDC that he testified about. 32 admissions emergency department. 130 people die who abused -- people who abuse are, are dependent and addicted. And 825 non-medical users.

So it just goes to show that the fact that it's not an individual issue. It's a community-wide issue. And I think Your Honor has asked questions about this, why is this not individual issues versus a community issue.

I think the evidence has been clear from our experts, from our witnesses that the opioid epidemic has been a

community issue. They have treated it as a community issue. They've worked together as a community to deal with the issues and look for Your Honor to empower them to do more with that.

Your Honor, we submit our case to you to empower the City of Huntington and Cabell County to work with the opioid crisis that they have, to work together as they have in the past, and award sustainable funding so that they can deal with their opioid addiction.

We also submit to Your Honor that the county and city have an infrastructure within the community to be able to do what they need to do with sustainable funding, funding that we believe that we have proven to your court that we have the need, we have the means, at least to implement it, and we've proven the liability for the responsibility of these companies to fund a program for City of Huntington and Cabell County.

Your Honor, thank you for your time.

THE COURT: Thank you, Ms. Kearse.

Well, we're way ahead of schedule. It's 20 till 12:00.

Can we come back at 1:00? Is that too soon, Mr. Nicholas?

MR. NICHOLAS: Whatever is best for the Court. That's perfectly fine.

THE COURT: That will give you enough time to warm

up?

MR. NICHOLAS: I think so.

THE COURT: Okay. Let's come back at 1:00. We'll be in recess until 1:00.

(Recess taken at 11:41 a.m.)

THE COURT: Yes, ma'am?

MS. WICHT: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. WICHT: Before Mr. Nicholas goes, I wanted to -- when we were last together two weeks ago, we had let you know that there were a few deposition designations by the defense that were still working their way through the process. We've completed that now. And so, I just wanted to formally, for the purposes of the record, let the Court know that we've now submitted the deposition designations for Darren Cox, Robert Niddle (phonetic), Michael Mapes, the Cabell County Commission via its 30(b)(6) testimony of Beth Thompson, and some additional designations by Mr. Gilberto Conterro.

THE COURT: Thank you, Ms. Wicht.

MS. WICHT: Thank you.

THE COURT: All right, sir.

MR. NICHOLAS: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Nicholas.

MR. NICHOLAS: On behalf of AmerisourceBergen,

thank you for your consideration during this entire trial. We are now ready to sum up and we look forward to doing so. And I would start this way.

We have nothing but respect for the people of Huntington and Cabell who we met during this trial who are involved in attacking this crisis and turning it around. It was impressive.

But basically every witness in this case has confirmed what really happened here. Licensed physicians chose to address the issue of pain in Huntington and Cabell County by prescribing more opioid medication. 99-plus percent of them did so in good faith, using their own medical judgment, applying the medical standards of the day.

Licensed pharmacies dispensed the medicines that these doctors prescribed. The only thing to be said about the distributors is that they did not second-guess these medical judgments. They did not subvert the standard of care. They did not countermand medical decisions and withhold medicine.

They weren't qualified to do that. It wasn't their place to do that. The healthcare supply chain would have been fractured had they done it. And medicine would not have gone where it needed to go.

With all that said, AmerisourceBergen did its job. We had a Suspicious Order Monitoring Program, a really good one, which was described by our witnesses and unchallenged

during the trial.

Who in this trial actually suggested to the Court what AmerisourceBergen should have done but did not do? No one.

And let's be clear. AmerisourceBergen reported suspicious orders. We reported them around the country. We reported them in West Virginia. We reported them in Cabell County. We reported them in the City of Huntington. We also reported every single opioid shipment to the DEA contemporaneously.

Where was the evidence of unreasonable conduct by AmerisourceBergen? There was none. And it's not like the plaintiffs didn't have a full opportunity to put on a case. They used six and a half weeks. They offered historians, data analysts, experts, government officials. But as we listened to all these witnesses, what stood out is that they didn't have anything specific to say about AmerisourceBergen. All that they actually established was a number of pills, volume.

The hole in the plaintiffs' case, direct causation, simply was not addressed. The plaintiffs ignored it. They continued to ignore it through their closings. They relied on volume, but they provided no context.

You know, the plaintiffs are fond of expressions like pill spill, but the distributors did not -- it's not as if the distributors backed a fleet of trucks up, you know, into

Huntington and dumped pills into the street. They shipped medicine to licensed pharmacies pursuant to lawful prescriptions of an FDA approved medication written by licensed doctors and the distribution numbers and the prescription numbers lined up almost exactly 1:1 because prescribing drove, drove distribution.

All of this has been a source of enormous frustration and I'm speaking now especially for AmerisourceBergen, Your Honor, whose people are so dedicated, whose determination to do a good job has been so pronounced, and whose record frankly reflects it, reflects that. We've never even been fined by the DEA.

There is, however, a kind of catharsis in having been able to tell our story and expose the plaintiffs' case as misguided, misplaced, and having failed for a lack of proof.

And with that, by way of introduction, now I will more formally begin and I'd like to start with the standard.

Plaintiffs had to prove that AmerisourceBergen engaged in unreasonable conduct that was a direct proximate cause of the harm they have sought to establish in this case. They did not establish any unreasonable conduct by AmerisourceBergen and they did not prove causation.

The plaintiffs have shown no bad conduct on the part of AmerisourceBergen in Cabell County and the City of Huntington. Their fallback has been to suggest that there's

some kind of systemwide failure on AmerisourceBergen's part. There was no evidence of that either. So, I'm first going to address the issue of conduct as it relates to Cabell and Huntington and then as it relates to AmerisourceBergen's overall systems.

But before I do that, I would like to re-introduce to the Court the four AmerisourceBergen witnesses who testified. Chris Zimmerman, Steve Mays, David May and Michael Perry all testified as of cross in plaintiffs' case. And if the plaintiffs hadn't called them, I most certainly would have. They brought something that no one else did, firsthand knowledge from 1998 to the present.

Mr. Farrell, I think the first thing he showed you, the very first slide he showed you, was from his historian who made the reference as to how important primary sources are. These are the primary sources, these four witnesses.

They were able to testify about meetings they attended, presentations they made, training that they personally did, and interactions that they personally had with the DEA. These were the most informative witnesses in the case. Let's take them from left to right.

Chris Zimmerman, who has been with AmerisourceBergen since the mid-1990s, is an industry pioneer and the architect of the 1998 program that the company developed with the DEA and that the DEA approved in writing. He was

on stage with the DEA in 2007 and again in 2009 when AmerisourceBergen's program was held out as the industry standard.

Steve Mays. Steve Mays is a longtime Diversion Control employee with firsthand knowledge of the key events starting in the early 2000s. He trained DEA diversion investigators. There was testimony in this case about the 2005 DEA distributor initiatives when the DEA met with the different distributors.

Mr. Mays is the only person who testified at trial who actually attended these meetings. Not Mr. Rannazzisi. Not anyone else. Only Mr. Mays was there. And he told the Court what happened and it was not what the plaintiffs said happened.

David May joined AmerisourceBergen after a distinguished 30-year career with the DEA to head up Diversion Control beginning in 2014. He had an ironclad grasp of AmerisourceBergen's program, how it worked, and why it was effective. He explained how the company leveraged technology as the program evolved.

Mike Perry. Michael Perry was AmerisourceBergen's sales representative in Huntington and Cabell County. He was a resident of Huntington, a graduate of Marshall, and is devoted, obviously devoted, to his community. You may recall that he testified with great enthusiasm.

What was most important about his testimony was his knowledge and understanding of AmerisourceBergen's customer base in Cabell and Huntington. He regularly visited these customers. He was able to describe their locations, their physical appearance, the people who worked there, the kind of business they ran. He testified about the absence of red flags. None of Mr. Perry's testimony was refuted.

And this leads to the first point. The plaintiffs did not establish any unreasonable conduct on the part of AmerisourceBergen in Huntington or Cabell.

Excuse me.

Three important points right off the bat which, by now, are well known to this court. First, AmerisourceBergen only distributed to licensed pharmacies in Cabell and Huntington. This was confirmed by witnesses from both sides.

Second, AmerisourceBergen reported to the DEA every shipment of prescription opioids that it sent to Cabell and Huntington. Every one.

Third, AmerisourceBergen reported suspicious orders for its customers in Cabell County and Huntington.

Now, let's take a closer look at AmerisourceBergen's distribution to the plaintiffs in Cabell and Huntington. We were a full -- a full line wholesale distributor into Cabell and Huntington; meaning AmerisourceBergen distributed the full range of prescription medications and other health

products, not just opioids.

And understanding that, it is important to look at the overall shipments during the key years to compare the shipments of opioids to the shipments of health medicines overall into the community.

On this, on this, we were helped by the testimony of Ted Martins, a Price Waterhouse partner. He testified late in the trial. His testimony was brief, but it was extremely interesting. And here is what we learned:

This data depicts what we learned and I would draw several takeaways from this data. First of all, the overall shipments of all prescription medications to this county was extremely high, very high.

Dr. Gupta testified to this, as well. He told us that West Virginia ranked number one in the country for all prescriptions per capita. Number one in the country.

The next point from -- that we can draw from this chart is this. Opioids represented a very small percent of the medications. The opioids are the yellow line. The overall distribution is the blue line.

And the final point is that the shipment of opioids was not out of line at all. It didn't even keep pace with the shipment of other medicines in, for example, the peak year, which was 2009.

If the opioid shipments were disproportionate, the

bottom line, the yellow, would be getting closer to the top line, but it never did. In fact, the top line moved further away from the bottom line during the crucial years. So, the idea that there was something untoward about the amount of opioids that were shipped into the county is completely undermined right here. Right here.

Now, let's look at AmerisourceBergen's customers and what we heard about them at trial. In our opening, I displayed this list of AmerisourceBergen customers in Cabell and Huntington. Here is the list. Let's go through it and let's start off with the customers that were not mentioned by the plaintiffs at all. They're highlighted in yellow.

The plaintiffs had nothing to say, not a word about these AmerisourceBergen customers, and they appear to have no issue with them whatsoever. These customers comprised a significant portion of our distribution into Huntington and Cabell and include two of the State's leading hospitals, St. Mary's and Cabell-Huntington. These yellowed customers have gone unmentioned by the plaintiffs, so let's remove them from the list.

Now, let's next go to customers that were mentioned only briefly and only by data experts. For this next group of customers, the only evidence that the plaintiffs introduced was the number of pills they received. That was literally it. And that was the second week of trial and

they never circled back.

The plaintiffs never proved oversupply to these customers. The lawyers inferred it, but no one in the trial testified that our distribution to these customers was too high.

And, to the contrary, here is what Dr. McCann said on this very point. Question, and you cannot tell this Court how many prescription opioids should have been distributed to Cabell County or the City of Huntington; correct? Answer, correct. You cannot say whether or not all the charts you showed over the last day and a half show oversupply or undersupply; correct? Answer, correct. And no one else could either. No one else could either.

Back to the list. The plaintiffs have no evidence of unreasonable conduct as to these pharmacies. They avoid any discussion of them at all. Let's strike them off the list.

The plaintiffs only paid any attention at all during this trial to four of AmerisourceBergen's 31 customers and very little even as to those. Let's focus on three of them, two Walgreen's stores and Drug Emporium.

The only testimony about these stores was through their expert, Lacey Keller. The only testimony. And as this Court will recall, Ms. Keller focused on three prescribers, Deleno Webb, Phillip Fisher and Gregory Chaney, when -- who she tried to connect to AmerisourceBergen. The evidence was

thin to nonexistent. This is the sum total of it.

Now, this chart provides me with a jumping off point to address the top prescriber, bad doctor, whatever you want to call it point, once and for all. What is it that the plaintiffs are actually saying here? Because it's not entirely clear.

What they seem to be doing is picking these doctors that they know later got in trouble and saying that because they were top prescribers at pharmacies we service, we should have known something was wrong. So, they're saying we should have seen into the future. That's number one.

But, also, they're taking the expression top prescriber and making it automatically pejorative, but that's -- that's ridiculous. Look at this evidence. Look at the top prescribers at these pharmacies. These -- these are the pharmacies that the plaintiffs picked. But when we forced their expert to show the real numbers, the whole idea of this fell apart on them.

These doctors prescribed less than one percent of the medications at these pharmacies combined. All three of these doctors combined prescribed less than one percent. Yet, the plaintiffs are acting as if this should have set off alarm bells. On what basis?

Clearly, there was no evidence of unreasonable conduct here. Let's strike the Walgreen's and Drug Emporium stores

from the list.

THE COURT: By medications, are you referring to opioids or all medications? You said they prescribed less than one percent.

MR. NICHOLAS: Of all -- of all prescription -- of all prescribed -- of all prescriptions.

THE COURT: Okay.

MR. NICHOLAS: The only pharmacy left standing is SafeScript and I think it is correct to say, I think it's correct to say, that we've heard more from the lawyers in their opening and closing about SafeScript than we heard testimony or evidence during the entire trial. Nevertheless, I am happy to talk about SafeScript. SafeScript was only one of our 31 customers. It had its own DEA registration and its own state license.

Here's the evidence that the plaintiffs offered. They offered volume of pills, the fact that AmerisourceBergen granted a threshold request in October of 2011 when SafeScript's purchases were at 86 percent controlled substances, and they offered the fact that the owner was arrested at a traffic stop and the pharmacy closed. That was their evidence.

Here is the evidence that the plaintiffs did not offer. They offered no evidence that a single prescription pill that AmerisourceBergen distributed was diverted.

They offered no evidence that the owner or the pharmacist was ever prosecuted.

They offered no evidence that SafeScript ever failed a Board of Pharmacy inspection. And we heard testimony about how often the Board of Pharmacy did its inspections.

We heard no evidence that the Board of Pharmacy took any action.

We heard no evidence of any actual harm tied to SafeScript.

We heard no testimony from any plaintiffs' witness who knew anything about SafeScript. Nothing.

We heard no evidence of any investigations or action taken by the Huntington Police Department.

And on this point about the Huntington Police Department, this Court admitted into evidence at least four years' worth of Huntington Police Department's annual reports, as well as numerous drug threat assessments. Those reports and assessments set forth the department's accomplishments in detail, including drug arrests and investigations.

There is not a single reference to SafeScript in any of these documents. And if SafeScript was an issue, if it was an issue, it would have been in there.

And how do we know it? We know it because when there was a problem with a pharmacy in the community the

Huntington Police Department wrote about it. Their 2014 Annual Report provides a ready example, A Plus Pharmacy, which was not serviced by any distributor in this case.

This pharmacy really was a problem in the community, but incredibly unsurprisingly, plaintiffs didn't talk about it at all. Didn't mention it.

Now, here is what AmerisourceBergen offered as to SafeScript. Every transaction down to the pill level was reported to the DEA. AmerisourceBergen reported suspicious orders for SafeScript to the DEA. And here they are.

AmerisourceBergen conducted due diligence reviews of SafeScript. Here are notes in our files in evidence in this case describing a portion of our due diligence to SafeScript.

SafeScript's volume of -- SafeScript's volume of opioids went down every year from 2007 forward. That runs directly counter to everything that the plaintiffs are implying about SafeScript, but there it is. I believe the blue is oxycodone. The red is hydrocodone.

Now, Your Honor may recall that the plaintiffs tried to make something of an issue out of a threshold increase in 2011. This threshold, the threshold, in fact, moved up and down over the years in response to the pharmacies' needs.

Now, the plaintiffs would have you believe that this one threshold increase led to an influx of pills. But what

actually happened? SafeScript's volume of opioids went down after the threshold increase.

Question, all I want to ask you is -- this is to Dr. McCann, their expert -- is, this is August of 2011. Just from your analysis of the ARCOS data, after August, 2011, SafeScript's purchasing for oxycodone actually went down, correct? Answer, this e-mail seems to have been effective. Question, effective in lowering SafeScript's purchasing, correct? Answer, correct. And the e-mail reference was an e-mail from AmerisourceBergen.

Continuing on. As soon as we learned there was a problem with the owner, we terminated the relationship. Most importantly was Mike Perry's firsthand account. And what did he say? He said he visited at least every other week. He visited SafeScript, as he visited his other customers.

He said SafeScript was licensed by the Board of Pharmacy and the DEA. He saw no lines. He saw no people loitering outside. He saw no empty pill bottles or needles. He saw no out-of-state license plates aside from the Tri-State area license plates. He had no concerns about his contact, who was the Pharmacist in Charge, and he was aware of a customer base that fit the profile of the pills that were being shipped.

So, let's go back to our customer list to close the

loop on SafeScript. It's one of 31 customers. There is no evidence of any diversion and there is no evidence of what the plaintiffs are implying.

How is this the cornerstone of their -- a cornerstone of their entire case? SafeScript should come off the list. And this should be the end of the case. They did not prove any unreasonable conduct in this jurisdiction, let alone unreasonable conduct that caused any harm.

With zero evidence of unreasonable behavior by AmerisourceBergen and Cabell or Huntington, the plaintiffs have tried to put forth a secondary position, that our system had, quote, "systemic", unquote, failures that affected Cabell and Huntington in some way.

The huge problem with this, even leaving aside causation for a minute, is that there was no proof of systemic failures. Let's begin at the beginning and look at the legal requirements under the CSA.

The CSA asks four things of distributors. The first is physical security. As long as controlled substances are in the possession of a distributor, they must be kept under lock and key and stored safely pursuant to very specific physical requirements.

This is a big undertaking. Mr. Zimmerman recited the specifications for you in his testimony. They were extremely detailed.

And this Court heard no evidence from the plaintiffs that we failed to meet the physical security requirements whatsoever. There is no evidence that opioids were diverted while under our control. That is undisputed. We can check that one off in green.

The second CSA requirement is license verification. The plaintiffs have talked about customer due diligence and Know Your Customer requirements. We do those things, and I will get to them in more detail in a minute, but let's look at what the regulation requires.

The registrant shall make a good faith inquiry either -- inquiry either with the administration or with the appropriate state controlled substances registration agency, if any, to determine that the person is registered to possess the controlled substance.

This isn't a disputed issue in the case either. The plaintiffs' experts have acknowledged as much. We can move on. We can move on.

But before I do, and so we can -- we can go back to that one and we'll move on, but I do want to touch on the issue of customer due diligence a little bit further right now.

The plaintiffs have tried to suggest that we didn't do sufficient due diligence on our customers. They've provided no support for that other than to say it, but we have

discussed our due diligence in detail. For example, it is in the record that we did investigations into nine of our customers in Cabell-Huntington and in many, many other pharmacies nationwide. It's in the record that we have, over the years, developed all manners of data analytics that we use every time that an order is flagged for review that requires human personal review. That's due diligence.

It is in the record that Mr. Perry, as an example, walked into these pharmacies not once, but every couple of weeks. He knew what he was looking for and he kept his eye out for red flags. All of this is in the record. All of this is due diligence.

The plaintiffs have showed you nothing to counter this. They just keep saying that we didn't do due diligence. But that's not true.

We introduced evidence of due diligence at a number of pharmacies. Here are two examples. The -- and I'll read them. These are -- so, this is -- this is internal communication reciting some of the due diligence that we did and these are contemporaneous documents.

The account manager, Michael Perry, forwarded the CSRA Form 590 and photographs. Investigation does not indicate any type of diversion.

And the dashboard on the right is the evidence that we continued to -- we continued to review and analyze this

pharmacy routinely through 2015, which is when we stopped doing the business with them.

The same is true -- and I just read to you from -- this was the McCloud Family Pharmacy.

The same is true for Drug Emporium. Same idea. CSRA initiated an investigation of Drug Emporium number 1. Account manager Michael Perry completed CSRA Form 590. There is no indication of diversion. And, again, here the dashboard from 2015 proving up the continued due diligence.

And just to -- and just -- just to pause here, we introduced records of this nature during the course of this trial. I heard Mr. Farrell say we didn't keep records, but we did keep records.

You heard about our due diligence from our witnesses, each of whom described what we do with specificity and detail of record and under oath.

So, back to the requirements under the CSRA. We've already shaded in license verification. Good.

The third thing that's expected of distributors, the third requirement, is ARCOS reporting. The Court has heard a lot of -- this Court has heard a lot about ARCOS reporting and the fact that the distributors are required to report to the DEA all shipments of prescription opioids to its customers down to the individual transaction level.

We did that as confirmed by plaintiffs' expert, Craig

McCann. Virtually perfect. 99.9 percent. So, there's no dispute about our -- meeting our ARCOS requirements either.

And the fourth requirement is to maintain a Suspicious Order Monitoring Program. This is the only subsection that the plaintiffs have pointed to. Let me read here. The plaintiff, the registrant, shall design and operate a system to disclose to the registrant suspicious orders of controlled substances.

The registrant shall inform the field division office of the administration in his area of suspicious orders when discovered by the registrants. Suspicious orders include orders of unusual size, orders of -- orders deviating substantially from a normal pattern, and orders of unusual frequency.

This is the only subsection that the plaintiffs have pointed to. It has not changed since 1971 when it was enacted.

And I just want to pause on the language for a moment. The first sentence says that the registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances. We did that. That's not in dispute.

The second sentence, the registrant shall inform the Field Division Office of the administration in his area of suspicious orders when discovered by the registrant. We did

that and that isn't disputed either. We reported suspicious orders, including in Cabell and Huntington.

The third sentence reads suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency. Those terms have never been defined and they are subject to different interpretations and factors, but one thing is clear. One thing is clear.

Once Mr. Rannazzisi took over in 2007, the attitude of the DEA became this is for you to figure out. We aren't going to work with you and we will provide you no guidance. This is on you.

Now, this is 2021. At least since 2007, no one has told AmerisourceBergen your design was wrong, or your threshold should have been tweaked, or you should apply a different definition of unusual frequency. Even the witnesses in this lawsuit haven't been able to say that.

With all the time and money poured into their experts and all the scrutiny of our programs more than a decade after the fact, if there was something actually wrong with our system, they would have told you what it was. They didn't do that.

Our story from 1996 to today is a very strong one and what it shows you, above all else, is that we're not the company that they want to make you believe we are. We cared

about these issues. We tried to be pro-active at every turn.

You met our witnesses, Your Honor. They're clearly invested in dealing with these issues the right way. We all heard their testimony over the course of many days. They were obviously presenting to you, to the best of their ability, the events that happened and the whole history here. And all of the documents you've seen have corroborated what they said.

Is there any doubt? Is there really any doubt that they were telling the truth?

So, now, let's look at what we've learned. And the easiest way to do this is to work with a timeline. I've resisted a timeline until now, but it's time for -- it's time for a timeline.

In 1996, AmerisourceBergen approached the DEA about the development of a new Suspicious Order Monitoring System. We approached them. Technology was changing and we wanted to stay ahead of the curve.

So, for two years, Chris Zimmerman and the DEA worked together to develop and test the new Suspicious Order Monitoring Program. The objective was clear, to make the program, the suspicious order information being sent to the DEA, timely, useful and customizable at the field office level. The resulting program would flag orders being

processed at night that exceeded an agreed upon threshold and automatically faxed a list of them to the local DEA Field Offices in the morning. To be clear here, the DEA knew that suspicious orders were reported and were then shipped.

Now, here is the letter approving our program. We've seen this several times. I will, one more time, read from it. This is to grant approval of your request to implement on a nationwide basis your newly developed system to identify and report suspicious orders for controlled substances and regulated chemicals, as required by federal regulation.

DEA managers who have been involved with the testing of the system have relayed their positive opinions regarding its ability to provide information in a fashion which is not only useful overall, but is also responsive to the needs of the individual DEA Offices.

And the subject line says approve Suspicious Order Monitoring Program.

Now, this could not be clearer and the fact that the plaintiffs are continuing to deny that this was an approved program is emblematic of their entire case. They are trying to rewrite history. And they are doing that because they know that this is a really, really bad fact for them, really bad, because at least from 1998 to 2007, we were operating

this program with the DEA's express approval and endorsement.

This program remained in effect until 2007 and a couple of things happened during that nine-year period between 1998 and 2007 that are worth pointing out.

From 2001 through 2005, AmerisourceBergen trained the individuals from the DEA who were responsible for investigating diversion and enforcing the Controlled Substances Act. Steve Mays conducted this training and he showed this Court a copy of the presentation, which included training on the regulations.

So, contrary to the plaintiffs' assertion or suggestion that we were somehow in violation of the CSA, the DEA turned to us to train its people about the CEA (verbatim) and its requirements. Like so many other aspects of this case, Your Honor, they're saying something, but they're not proving it, and the evidence contradicts it. It disproves it.

The other thing that happened during this time period was the 2005 distributor initiative. Multiple witnesses had talked about these meetings between the individual distributor defendants and the DEA, but Steve Mays was the only witness who testified at trial who actually attended these meetings and can talk about them firsthand. Here is what Mr. Mays said.

Question, and, broadly speaking, what did you

understand DEA's concerns to be that they raised to you during this meeting? Answer, it was exclusively about internet pharmacy and the problems they were having with internet pharmacies.

Question, now, do any of these three slides say that the distributors should not ship an order that they deem to be suspicious? Answer, no, they do not.

Question, now, separate from the slides, Mr. Mays, did anyone at the meeting tell you from the DEA that AmerisourceBergen and distributors should not ship a suspicious order? Answer, no.

So, the meeting related to internet pharmacies, and there was no mention at this meeting of changing the practice to stop suspicious orders before they were shipped. This testimony and the memo next to it, which is the memo summarizing the meeting that was prepared by the DEA, are consistent. There is no reference in this letter to not shipping suspicious orders.

Steve Mays also testified about the steps AmerisourceBergen took after the meeting. Mr. Mays, can you briefly describe this new investigative program that you initiated -- in response to DEA's internet pharmacy initiative? Yes. It was, again, based on the discussion that I had with the DEA in the August meeting. We put together a policy and a procedure on how these

investigations were being conducted, identified the sources that would prompt one of these investigations, mainly the review of the possible excessive Suspicious Order Report.

Also, if we got a notification from DEA that they were concerned about a customer, or if they took action against a customer, that would prompt one of these investigations.

And, also, if we were notified by a distribution of concerns or someone from the sales team, any of those three areas would prompt one of these investigations. This is pretty detailed testimony. And I even put in, you know, specific procedures that had to be followed on each one to make sure that we were consistent in how we conducted them.

This brings us to 2007, when the DEA issued an Immediate Suspension Order for AmerisourceBergen's Orlando, Florida facility. As Your Honor has heard, this came as a complete surprise. And that's what Mr. Zimmerman told you when he testified.

We went to the 2005 meeting, he said. We implemented a new policy. We opened up additional investigations. We had open dialogue with the Orlando DEA Office.

In 2006, they submitted us a list of questionable pharmacies. We investigated them. We shut some down. We denied others from opening. This is in 2006.

And then, you know, to get the immediate suspension orders as we're working with the local DEA Offices was a

shock without any notice of any issues going on in Florida.

Mr. Zimmerman went on to explain that the suspension order was related to four internet customers, three of which we had already cut off as customers.

Now, there are a few key points about the suspension order that were made very clear during the course of the trial.

First, the Orlando distribution center did not service West Virginia or Cabell.

Second, the suspension was limited in both scope and duration.

Third, there was no admission of liability.

Fourth, there was no fine.

And, fifth, we began daily reporting of controlled substance sales, which we continue to do to this day.

And AmerisourceBergen and DEA worked together to design a new program that would become the new industry standard.

I want to pause here, first all, to take a sip of water.

THE COURT: You tell me when you need a break, Mr. Nicholas.

MR. NICHOLAS: I'm okay. You tell me if you need a break.

THE COURT: Don't worry. I will.

MR. NICHOLAS: I would like to pause here to

address an issue that came to be known in the litigation as do not ship. I have alluded to this already, but let's put it to rest.

You will recall that AmerisourceBergen stopped shipping suspicious orders in 2007. The other distributors stopped in that same general time frame. In this litigation, in the litigation generally and in this case specifically, the plaintiffs have argued vehemently at times, at least for awhile, that the distributors had never been allowed to ship orders that had been reported as suspicious, that the regulations and the DEA forbade it. In the face of the following evidence, Your Honor, this position became totally untenable and insupportable.

First of all, the shipping requirement does not appear in the regulation.

Second, Chris Zimmerman, who was developing, testing, and getting the Suspicious Order Monitoring System approved by the DEA during this period testified that there was no such requirement and explained why the distributors were continuing to ship.

So, is it correct -- my question now, under this new approved program, was AmerisourceBergen required to hold and not ship? Answer, no. So, is it correct that the DEA approved the 1998 program that included reporting suspicious orders after shipping them? Answer, yes.

Question, now, why would you ship orders that were suspicious? Answer, again, we reported our orders that we felt were suspicious, but we would ship the -- we shipped the order not to impact patient care and the supply channel.

This point about not disrupting the supply channel is extremely important because every order that's blocked is an order that isn't going to get to a patient for whom it was prescribed. But, in any event, Chris Zimmerman isn't alone in his position that there was not a no ship requirement.

Let's look at what Thomas Prevoznik from the DEA had to say. Now, we saw a lot of clips from Mr. Prevoznik in Mr. Farrell's closing, so I'm happy to be able to show you this one.

Okay. Mr. Prevoznik, the DEA approved for implementation nationwide a Suspicious Order Monitoring System that reported suspicious orders to the DEA on a daily basis after the report -- after the orders had already been shipped, correct? Answer, yes.

Also, Your Honor may remember taking judicial notice of what's been referred to as the money case in federal court in Michigan where DEA officials absolutely acknowledged that there was not a no-ship requirement. I'll read from just -- five sentences or a few sentences.

The opinion states, in all events, Wright, that's Kyle Wright of the DEA, testified that the DEA was aware that it

was standard practice in the industry to file Suspicious Order Reports while continuing to ship products and that practice -- and that practice had been approved by the DEA.

Wright's supervisor, Michael Mapes, told distributors that the DEA's pharmaceutical -- at the DEA's pharmaceutical conference on September 11th, 2007 that the DEA's new interpretation of the suspicious order regulation was that distributors should suspend shipments if they routinely report suspicious orders when reasonably they are destined for the illicit market. Mapes informed Wright of that policy interpretation, as well. And then, finally, of course, that is all the regulation requires.

So, based on the evidence, it does not appear that there was ever a basis for pursuing this theory which is so directly contradicted by the record. Maybe the plaintiffs have dropped it. It wasn't mentioned in Mr. Farrell's closing. They should drop it, if they haven't.

And we can now return to the timeline where AmerisourceBergen had its license in Orlando restored and developed a new national program to detect and report suspicious orders. Steve Mays testified about the development of the new program in 2007 and his interactions with the DEA. The DEA liked the program that AmerisourceBergen developed so much that they decided to show it off to the industry a few months later.

In September, 2007, Mr. Zimmerman was asked to present the new program to the DEA's distributor initiative conference. To this day, the DEA's website describes the presentation that Mr. Zimmerman gave with Mike Mapes, then Chief of the DEA's Regulatory Section, by his side.

And what did Mike Mapes think of AmerisourceBergen's program in 2007? We asked him at his deposition. This is very, very powerful testimony, I believe. I would submit.

After you -- after you reviewed the new changed program that AmerisourceBergen had developed, you attended the DEA-sponsored pharmaceutical industry conference in Houston, Texas, in September of 2007. Do you recall that? Yes, I do. And that was a DEA Diversion Control Division-sponsored conference? It was.

Did you have an understanding that Chris Zimmerman was asked to present at this conference because you and the DEA thought that AmerisourceBergen's new system, the changed system, was appropriate and would be good to share with others in the industry? Yes. That was my understanding of why he was asked to be part of that.

Do you believe -- was it your understanding that it was expected by the DEA, to your understanding, to serve as a new standard? It is my understanding that AmerisourceBergen's system was an example of a system that contained the type of information that we were looking for.

THE COURT: Excuse me. Go ahead.

MR. NICHOLAS: Question. Last question, last answer. And was compliant with the Controlled Substances Act? Answer, yes.

There is no better evidence that AmerisourceBergen's program was compliant than the words of the person at the DEA whose job it was to keep a sharp eye on these distributors and their programs.

In keeping in line with that, we were asked to present again in 2009 a similar presentation. Here it is.

In 2014, AmerisourceBergen hired David May, 30 years with the DEA, to head up its Diversion Control Team. His presentation to this Court of the main features of AmerisourceBergen's program was unchallenged and it was impressive.

Here are some of the things, a few of the things, that Mr. May talked about in a lot more detail than this slide shows: The leveraging of technological advancements to aid human review. The refinement of analytics in addressing customer orders. The expansion of our Diversion Control Team to include investigators, pharmacists, other law enforcement.

And to give you just one concrete example, just one of what I'm talking about, you saw the dashboards during Mr. Mays' -- Mr. Mays' testimony. The sole purpose of these

dashboards is to make sure that human reviewers have all of the information they need to make good decisions.

These reviewers are not just stamping "approved" on these orders. They're assessing a great deal of information about the customer and about making decisions and they're making decisions in accordance therewith.

The reason I'm dwelling on this, this is all due diligence. That's what this is. This is diligence. And the company was doing whatever it could to stay on the cutting edge of technology and analytics.

If the plaintiffs' claim is that we don't care about diversion, that does not hold water. It's clear that we've gone above and beyond to advance and update our Diversion Control system.

If they're attacking the concept of thresholds, which we and all the distributors use as our method to flag orders, we didn't hear that criticism from any of the witnesses at trial and no one suggested another way to do this. They didn't say what the threshold should be. They didn't say how it should be calculated.

If they're attacking our use of a multiplier, which is also something that all distributors use in connection with setting the threshold, none of their -- none of the plaintiffs' witnesses said to you the multiplier we used was wrong. And none of them suggested what they thought the

multiplier should have been.

Because these are difficult, complex decisions, especially with no guidance, especially with no guidance from the DEA, but the DEA knew what we were using all along. They signed off on it. They signed off on it in 1998. And they signed off on it again in 2007.

They have put on no evidence that anyone other than the attorneys have an issue with how we calculated thresholds or the multiplier.

To seal off this point, there is nothing else to put on this timeline. No shutdowns. No suspensions. No fines.

Your Honor, I can keep going, but since I think I'm the only person going this afternoon, if you wouldn't mind, if we could take just a five-minute break?

THE COURT: Yes, that would be fine. I've already told Ms. Mainigi she wouldn't have to argue today.

MS. MAINIGI: Now, Your Honor --

THE COURT: So, we've got a bad time. I've done some bad time management, but I'm stuck with it.

We'll be in recess for about ten minutes.

MS. MAINIGI: I appreciate you keeping the deal, Your Honor.

(Recess taken)

(Proceedings resumed at 2:08 p.m. as follows:)

THE COURT: All right, sir, you may proceed.

MR. NICHOLAS: Thank you, Your Honor.

In the face of all of this positive and favorable information about AmerisourceBergen's system and how it operated in real life, the plaintiffs have mounted no actual challenge. No one addressed the specifics of our program at all. No one disputed a word that Mr. May, Mr. Mays, or Mr. Zimmerman said. No one challenged any of their recollections of meetings or events.

Instead, the plaintiffs limited their case on conduct to their two supposed star witnesses, the expert James Rafalski and the former head of Diversion Control at DEA, Joseph Rannazzisi.

Okay. A few observations about the testimony of Mr. Rafalski. I am not really going to talk about the fatal infirmities with his supposed methodology. That has been well briefed to Your Honor. And I know you're still considering those issues and consider -- in connection with the *Daubert* motion, *Daubert* challenge. But I will say this much.

This expert looked at you and everyone with a straight face and he testified that these distributors should have blocked 90 percent of the opioid medications to Cabell and Huntington during all of the years in issue. That was outrageous and it was preposterous.

It was outrageous because it would have had the absurd

and heartless effect of depriving almost everyone in the county and in the city from medicine to treat their pain as prescribed by doctors.

It was preposterous because it assumed that almost all of the doctors in the county and in the city didn't know what they were doing or had bad intentions.

Mr. Rafalski should be afforded no credibility. His testimony should be disregarded. And the fact that the plaintiffs plowed ahead with his testimony, testimony of that nature undermines their credibility.

Consider what the plaintiffs promised as to how Mr. Rafalski was going to prove out their case and then compare it to what he did and did not do.

Recall Mr. Farrell's promise because it was, it was colorful. He made a huge deal about how he was going to do it. He said that Mr. Rafalski was going to develop and present what he called a case file -- those were his words, Mr. Farrell's words -- that would catalogue AmerisourceBergen's conduct, a case file that he would bring to Your Honor and give to you proverbially, and that he was going to march that case file into court and show it to you, a case file about our failings.

Well, where was the case file? As to AmerisourceBergen's customers in Cabell County and the City of Huntington, he did not mention a single one. And he

admitted that he offers no opinions about whether diversion occurred at the pharmacy level, no opinions.

As to the thresholds used by AmerisourceBergen to flag potential suspicious orders, he testified that there is not one, quote, particular golden rule on what the trigger should be, unquote, but then proceeded to flag an astronomical percentage of the orders that AmerisourceBergen shipped into Cabell and Huntington.

Yet, he did not even look at the orders he flagged or that he was challenging, not even the initial order that triggered the thousands of orders that followed. He couldn't be bothered to look at it or testify about it.

As to the one thing that he did offer an opinion on, the one thing, due diligence, he simply offered a completely empty conclusion without identifying the tiniest sliver, the tiniest morsel of evidence about it.

This was their big moment. Okay? This was their -- this was what they were building to. After all of the build-up about Mr. Rafalski, there was this key question by Mr. Farrell to Mr. Rafalski about due diligence:

Question: "And have you gone through the customer files and the documents produced by AmerisourceBergen, McKesson, and Cardinal Health?"

"I have, Your Honor."

"And have you found sufficient evidence in this

record -- in the record to dispel the suspicion of any of these orders that, that were or should have been flagged?"

"I have not, Your Honor."

And that, that was the sum total of Mr. Rafalski's discussion of due diligence. That is the case file that he came in here with. That's it. That is it.

Now, here's what he did not come in with. He didn't come in with testimony about what AmerisourceBergen's due diligence files contained. He didn't come here with criticisms of any shortcomings, examples of things that were missing.

How much in the files themselves? He said he reviewed them. But he didn't tell you a single thing that was wrong with AmerisourceBergen's due diligence.

So that was Mr. Rafalski, one of two star witnesses for the plaintiffs.

And the other star witness was Mr. Rannazzisi, Joseph Rannazzisi, the former head of Diversion Control for the DEA.

He actually wound up testifying quite favorably about AmerisourceBergen. He corroborated our evidence. And he was actually careful not to criticize us.

For example, he acknowledged that he was briefed on the fact that AmerisourceBergen took actions after the 2005 distributor initiative.

Question: "And, so, can you agree with me that AmerisourceBergen took affirmative steps in line with DEA's suggestions coming out of that meeting?"

Answer: "I was told that you had altered or changed or modified how you were looking at suspicious orders, yes."

He confirmed we never paid a fine.

"In fact, to your knowledge, AmerisourceBergen has never paid a fine to the DEA; is that correct?"

Answer: "As far as I know, we've never had a fine from AmerisourceBergen."

And he confirmed that there were no subsequent enforcement actions after the Orlando settlement in 2007.

"Mr. Rannazzisi, did DEA bring additional actions against AmerisourceBergen during your tenure as Deputy Assistant Administrator?"

"I don't recall any additional actions against AmerisourceBergen."

So the two witnesses that plaintiffs said would establish unreasonable conduct on the part of AmerisourceBergen did not.

And as we return at last to the regulation and the supply -- and, and we consider the supply chain and the history and we take stock, here is what we see: Compliance with the CSA.

So what is left of Ameri -- so let me, let me take a

beat here.

What is left of plaintiffs' case? Volume. It's volume. But there is a perfectly rational explanation as told almost entirely during this trial, during this trial through the plaintiffs' own experts.

The plaintiffs' six-week presentation of evidence boiled down to this one thing: Volume. All that they have done is to suggest that the -- is to suggest that the number of opioid pills shipped to Cabell and Huntington was too high.

They basically asked you to draw an inference that the distributors should have known this and in some ill-defined way, they should have shipped fewer pills.

Why the distributors should have been expected to conclude this based on bulk orders they were receiving from licensed pharmacies who were filling lawful prescriptions is left unexplained.

And how distributors could have responsibly cut their shipment down without -- their shipments down without disrupting the doctor/patient relationship, the role of the pharmacy, or the supply chain overall is unexplained.

Remember, distributors don't see individual prescriptions. They don't see -- they don't see patient information. They don't communicate with doctors. They're shipping orders in bulk. They're shipping orders in bulk.

If they were to cut off supply, a random subset, a random subset of patients with opioid prescriptions that were written by well-intentioned doctors would not get their medicine. Patients on Hospice, patients with cancer, patients with debilitating pain, those are examples of people who may not get their medicine -- who wouldn't get their medicine. This just makes no sense.

Besides, volume has been well explained in this trial by many, many witnesses, including the plaintiffs' witnesses.

First, prescribing drove volume. If there is one thing in this case that pretty much every witness from both sides has said and agreed upon by now, it is that the distributors didn't determine volume. Doctors determined volume.

Second, there are clear identifiable reasons why prescribing increased. We're not one of them. There is an overwhelming amount of evidence from this trial about the increase in prescribing of opioids in Cabell County and the City of Huntington, as well as in West Virginia, and as well as in the United States.

And the reasons for this are no secret and have been extensively addressed by a number of experts, as well as most other witnesses. The standard of care for the treatment of pain changed over time.

That is why, that is why witness after witness has told

you that 99 and a half percent of these doctors were prescribing in good faith. They were following the standard of care. And here are all of the plaintiffs' witnesses who told you that.

Third, the plaintiffs' data experts drove these points home. They drove them home. Plainly, the change in the standard of care increased opioid prescribing which in turn increased opioid distribution.

The plaintiffs have harped on the fact that the average distribution of opioids in Cabell and Huntington was higher than the West Virginia and national average. That's solely because prescribing was higher in the state -- was higher than the state and higher than the national average.

Start with -- so let's just look at the data and let's look at what their witnesses say. Start with the trends. Okay?

Plaintiffs' expert Lacey Keller looked at prescribing in Cabell/Huntington. And their expert, Dr. McCann, looked at distribution in Cabell/Huntington. And the trends matched.

Question: "So the chart that shows prescriptions and the chart that shows distributions generally follow the same pattern; correct?"

"Yes."

And then check out this quote:

Question: "Okay. And the fact that prescribing in Cabell County peaked in 2009 is entirely consistent with your countless opinions that distribution peaked in 2009; correct?"

"Correct. That's what I say. They're two sides of the same coin."

Now go to the numbers. Down to the person, the numbers matched.

"Now, do you have any quarrel, Ms. Keller, with the observation that your per capita prescription analysis and Dr. McCann's per capita distribution analysis come within one pill of each other over this nine-year period?"

"That's what the math is, yeah."

Question: "That's what the math shows. So the IQVIA prescription data and the ARCOS distribution data get us to the same place; correct?"

Answer: "Again, they're two different sides of -- one is shipments and one is prescriptions, but they -- for that time period, we both arrive at about the same number of pills per person."

She's understating it when she says "about," "about the same number."

They -- it is actually amazing when you think about it. These two experts worked separately with two different datasets. One looked at prescribing and one looked at

distribution and they arrived at the exact same number. Prescribing equaled volume. It was the same thing.

There was no denying this, and no one denied it. And there was no other explanation for the increase in distribution other than increased prescribing.

What also came clear from the evidence is that the plaintiffs did not and could not demonstrate over-supply. Over-supply would mean our distribution exceeded prescriptions, but that didn't happen.

And plaintiffs never said how many pills we should have shipped. They've not even tried to approximate the number. Have they offered any evidence, for example, that we should have shipped 10 percent fewer pills? That we should have shipped 20 percent fewer pills? No, they have not because they can't. They can't.

They know perfectly well -- they know that behind each pill was a prescription written by a doctor in this community based on the doctor's medical judgment that neither the plaintiffs nor -- neither the plaintiffs' lawyers nor their experts were going to challenge. They just weren't. And they didn't.

The last point about volume is this. Distributors should not second-guess prescribers. It's dangerous to do that. The consequences of doing so are dangerous. It is not the distributors' role to second-guess doctors.

Question to Mr. Rannazzisi -- to Mr. Rafalski: "There's no determination -- no requirement in the regulations that distributors have to affirmatively determine that prescribing decisions are legitimate, is there?"

Answer: "I'd agree with that."

Question to Mr. Rannazzisi: "And a distributor cannot make the determination if a controlled substance is medically necessary for a particular patient; correct?"

Answer: "Yes. And we've never asked a distributor to do that."

There are real patient access risks in arbitrarily cutting supply. Here's what Mr. Rafalski said:

"Okay." Question to him: "Okay. If you impose arbitrary limits, you might impact diversion, but you might also keep it from people who need it; correct?"

Answer: "That's, that's my point, yes, sir."

Question: "That would be a concern for the distributors too. If they arbitrarily imposed limits on prescription opioids, that could also prescribe [sic] medication from people who needed it. True?"

And then, "Is what I said true?"

Answer: "Yeah, it's true."

This next quote, this one I want to -- I need to dwell on just for a minute.

"So, Mr. Rannazzisi --"

He was being questioned about the quota.

"So, Mr. Rannazzisi, as the opioid epidemic and opioid diversion grew, why didn't DEA lower quota?"

Answer: "You can't just lower quota. It, it doesn't work that way. And I know people have said this over and over again. Quota -- it's a scientific and mathematical exercise to ensure that there's enough drug in the system. I always think of it this way. If you have 100 people and all of those people are trying to get oxycodone and some of them are, are drug-seekers who shouldn't have it and some of them are legitimate patients that need it, maybe they're in palliative care, maybe they're chronic pain, but they need that drug, the quota is established so they will get the drug. But if I come in and say, you know what, I'm just going to cut it by 20 percent, then that's 20 percent less but that patient, the patient population and those drug-seekers are competing for now 20 percent less. And that's how shortages occur."

"And you had --"

Question: "And you had the concern that if you arbitrarily cut the level of the quota, that could have negative consequences for real-life patients; correct?"

Answer: "Yes, that's correct."

Now, I do need to take a beat here and let the irony of

this statement by Mr. Rannazzisi sink in.

This may be the most frustrating testimony in the entire case because, because this is a perfect statement of our position as well, and it's what we've been saying all along.

If we arbitrarily limit the supply, people who need their medication will not receive it. They will be without it. We have to be very careful when blocking shipments because we have no way of knowing or controlling who would have access to the limited supply and who would be left empty-handed.

Those are the exact same things that Mr. Rannazzisi is saying here in this statement. And the reason we're so frustrated is because it's perfectly fine when Mr. Rannazzisi explains this to justify why he continued to raise the quota in the midst of the opioid crisis, yet the plaintiffs are unwilling to apply that exact same logic to the position we're in.

The plaintiffs want to rely on this erroneous over-simplification that the way to lower volume is to simply not ship opioids in spite of the fact that they're being shipped in response to legal, legitimate orders.

To borrow the words of Mr. Rannazzisi, it doesn't work that way. It doesn't work that way.

Even assuming that the plaintiffs proved unreasonable

conduct, they still have to prove that the unreasonable conduct was a direct cause of the harm. They did not do so. They did not prove proximate cause.

I want to go back to the supply chain to show you just how far removed AmerisourceBergen is from the alleged harm, and also to highlight how many significant intervening causes exist between the unproven, unreasonable conduct and the alleged harm.

AmerisourceBergen is here. Once AmerisourceBergen distributes the medication to its customers, it has no visibility. There's the customers, pharmacy, hospital and so forth. It has no visibility as to what happens after that point.

And, most importantly, it never knows the identity, medical condition, or medical history of the patient. The alleged harm that we're talking about is over -- way over here.

Now, we discussed this already, but it is worth repeating now. The plaintiffs did not prove diversion at any point between AmerisourceBergen and its customers, nor did they prove diversion at the pharmacy level.

The plaintiffs focus entirely on downstream diversion. There's just no causation here and there are countless intervening causes.

First and foremost, there is -- fundamentally, okay,

there's the prescribing relationship between the individual doctor and the individual patient.

We had no role into that. We have no insight into that. We have no sight line there. We're not in a position to second-guess the decision made by that doctor for that patient. And it was not our responsibility to do so. We also played no role in influencing whether the doctor would prescribe an opioid.

Others clearly did; the Joint Commission, the West Virginia Board of Medicine, Purdue Pharma. In fact, it's the plaintiffs themselves, the plaintiffs who blame the Joint Commission. It's the plaintiffs who blame Purdue.

Even if we were to stop right here, there's no proximate cause. But to get to the harm alleged here, the plaintiffs had to prove a lot more because the alleged harm is not at the patient level. It's way out here. It's very downstream.

And when we talk about downstream diversion, this is what it is. It's medicine cabinet diversion which, which accounts for the overwhelming source of diverted opioids. It's drug trafficking organizations from Detroit, Akron, Columbus. It's heroin and fentanyl originating from Mexico, from China.

All of these things are illegal acts, including the medicine cabinet diversion, quite honestly. All of these

things are illegal acts. Diversion by definition is illegal conduct. Illegal acts break the causal change. And AmerisourceBergen should not be financially responsible for harm it did not cause.

The bridge is too far, way too far to try and connect AmerisourceBergen to the alleged harm. They didn't prove direct proximate cause.

Now, the last thing I want to talk about, Your Honor, and I'm going to do it briefly, is abatement.

I never, I never like talking about damages in a case where I don't think there's any liability. And for that reason, I'm, I'm reluctant to talk about it here. But I'm going to say a few words.

First of all, the plaintiffs have framed this as if it's a public nuisance case where they are seeking equitable relief in the form of abatement. But let's be super clear about this. They want a check. They're asking for a check.

And I'd say that they're asking for a blank check, but that's not technically true. They're asking for a check for two and a half -- $2.5 billion which might as well be a blank check.

And Dr. Alexander didn't bother to tell us what it is that the plaintiffs would actually do with the money, did he. He didn't.

First, Dr. Alexander's abatement plan does not suggest

a single change to the way AmerisourceBergen does business, to its diversion control efforts, to its Suspicious Order Monitoring Program System, to its compliance practice, or to anything else. His recommendations have nothing to do with distributors' activities.

Second, Dr. Alexander is asking for a check for two and a half billion dollars to address the needs of a specific city and a specific county where he couldn't be bothered to take into account the programs that Huntington and Cabell already have in place. Programs -- good programs have been in place for years and we have heard ample testimony about these programs.

He did no analysis of budgets or staffing. He did no analysis of occupancy rates and the wait list for admission. He did no analysis of the number of people served on a yearly basis. He did zero analysis of the impact of these programs on the city and county budgets. And he did no analysis of the existing and likely funding sources for these programs.

I mean, it's unclear why those things aren't reflected in his plan. He did mention some of them, so we know he was aware of them.

One might conclude -- one might conclude that it's inconvenient for purposes of this lawsuit that Huntington and Cabell have well-constructed programs that are working,

even though in real life that's obviously a good, a really good thing.

And, finally, just as a reminder, but a reminder of something significant, the city and the county don't pay for the things that they are requesting in their abatement plan. And on top of that, they're operating at a surplus of millions of dollars.

We respect what Huntington and Cabell have accomplished in dealing with this crisis. But it is not equitable relief for these plaintiffs to be handed a check for two and a half billion dollars for services that they don't pay for.

Your Honor, I feel like I've been talking for a pretty long time. And I know you're going to hear from the other defendants as well.

I do want to say this to the Court. This case could not be more important to AmerisourceBergen. We hope that in this courtroom we have been able to convey how strongly we feel and believe that we are not liable. And we look forward to your decision. And we appreciate your consideration.

Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Nicholas.

Well, I guess we'll come back at 9:00 in the morning and we'll hear from the other two defendants. And then we'll hear -- we'll take a break for lunch and hear from the

plaintiffs in rebuttal. See you then.

(Trial recessed at 2:40 p.m.)

CERTIFICATION:

I, Ayme A. Cochran, Official Court Reporter, and I, Lisa A. Cook, Official Court Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the matter of The City of Huntington, et al., Plaintiffs vs. AmerisourceBergen Drug Corporation, et al., Defendants, Civil Action No. 3:17-cv-01362 and Civil Action No. 3:17-cv-01665, as reported on July 27, 2021.

S\Ayme A. Cochran
Reporter

s\Lisa A. Cook
Reporter

July 27, 2021.

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